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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 19[REDACTED] 1918**

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**No. [REDACTED] 264**

**DAVID F. HOUSTON, A. D. MELVIN, AND JAMES J.  
BROUGHAM, APPELLANTS,**

**VS.**

**ST. LOUIS INDEPENDENT PACKING COMPANY.**

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**APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT.**

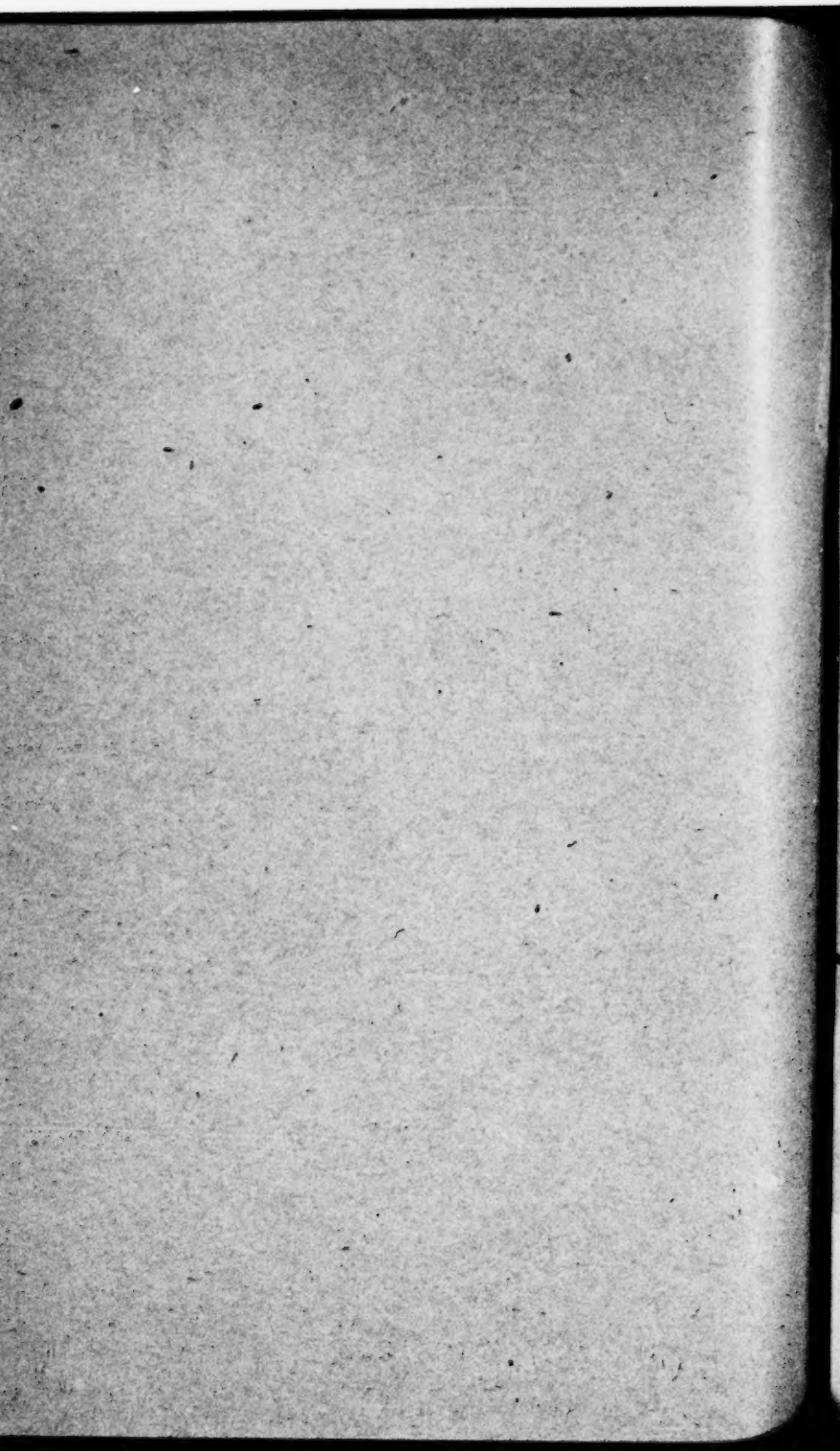
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**FILED SEPTEMBER 7, 1917.**

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**(26134)**





# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 667.

DAVID F. HOUSTON, A. D. MELVIN, AND JAMES J.  
BROUGHAM, APPELLANTS,

vs.

ST. LOUIS INDEPENDENT PACKING COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May term, 1917, of said court, before the Honorable Walter H. Sanborn and the Honorable Walter I. Smith, circuit judges, and the Honorable Charles F. Amidon, district judge.

Attest:

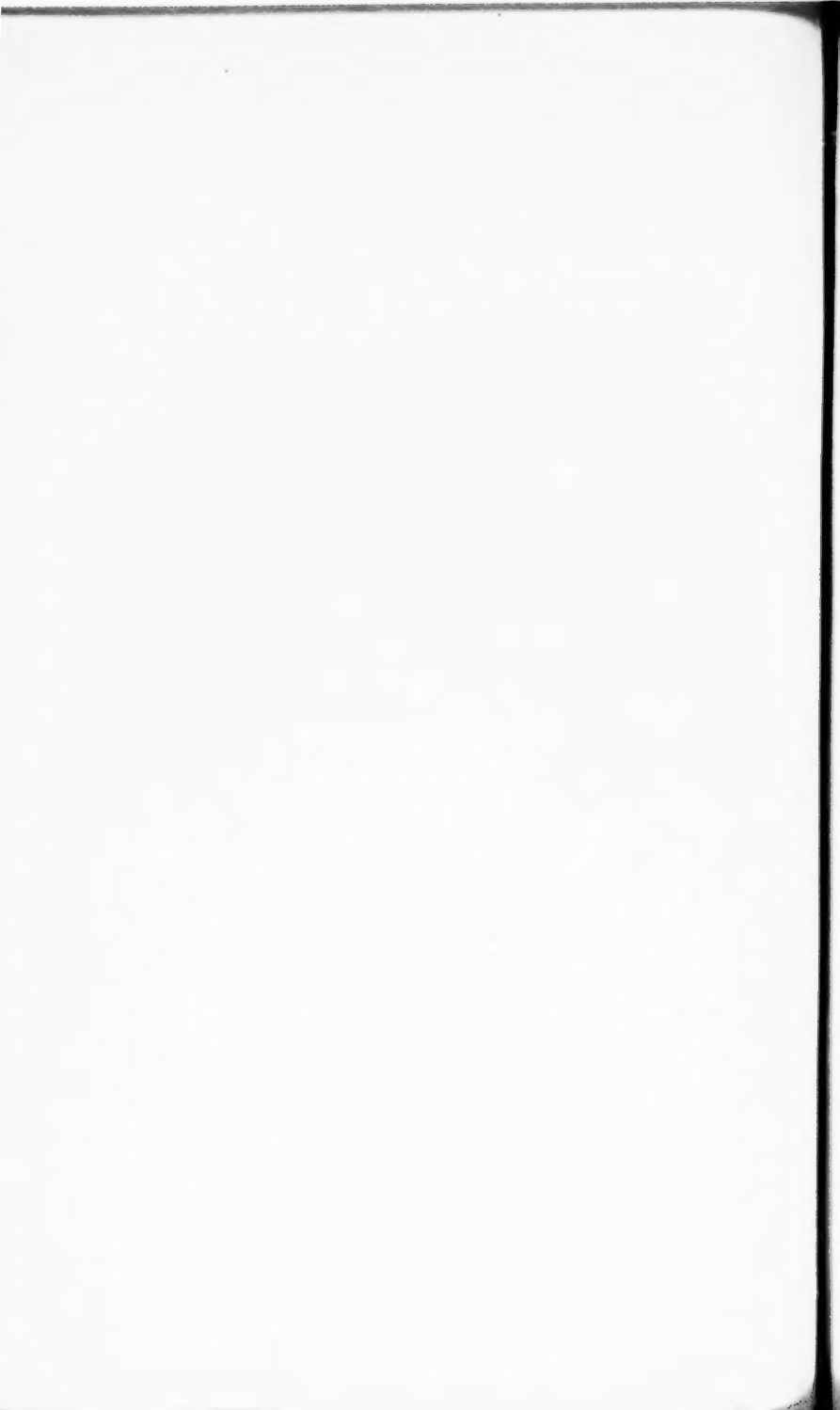
[SEAL.]

E. E. KOCH,

*Clerk of the United States Circuit Court of*

*Appeals for the Eighth Circuit.*

Be it remembered that heretofore, to wit, on the fourteenth day of April, A. D. 1916, a transcript of record, pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Missouri, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein St. Louis Independent Packing Company, a corporation, was appellant, and Honorable David F. Houston, Secretary of Agriculture, et al., were appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, is in the words and figures following, to wit:



The United States of America, To Honorable David F. Houston, Secretary of Agriculture; and James J. Brougham, Chief Inspector of the Bureau of Animal Industry of the Department of Agriculture—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, at St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an order granting appeal, filed in the Clerk's office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein St. Louis Independent Packing Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said order granting appeal, mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable David P. Dyer, Judge of the District Courts of the United States within and for the Eastern District of Missouri, this 7th day of April, in the year of our Lord one thousand nine hundred and sixteen.

DAVID P. DYER,  
United States District Judge, For  
the Eastern District of Missouri.

Service of foregoing citation acknowledged this Apr. 7<sup>th</sup> 1916.

ARTHUR L. OLIVER,  
U. S. Attorney.

2 Endorsed: Filed in the District Court on April 7, 1916.

3 United States of America,  
Eastern Division of the Eastern  
Judicial District of Missouri—ss.

In the District Court of the United States Within and for the  
Eastern Division of the Eastern Judicial District of  
Missouri.

Be It Remembered That heretofore to-wit on the 7th day  
of April, A. D., 1913, there was filed in the office of the Clerk  
of the District Court of the United States within and for the  
Eastern Division of the Eastern Judicial District of Missouri,  
a certain Bill of Complaint, wherein St. Louis Independent  
Packing Company, is plaintiff and Honorable David F. Hous-  
ton, Secretary of Agriculture; A. D. Melvin, Chief of the  
Bureau of Animal Industry of the Department of Agricul-  
ture; and James J. Brougham, Chief Inspector of the Bureau  
of Animal Industry of the Department of Agriculture are de-  
fendants, which said bill of complaint was duly numbered 4156,  
and is in words and figures as follows, to-wit:

(Bill of Complaint.)

4 In the District Court of the United States for the East-  
ern Division of the Eastern Judicial District of  
Missouri.

St. Louis Independent Packing Company, Plaintiff,

vs.

Honorable David F. Houston, Secretary of Agriculture; A. D.  
Melvin, Chief of the Bureau of Animal Industry of the  
Department of Agriculture; and James J. Brougham,  
Chief Inspector of the Bureau of Animal Industry of  
the Department of Agriculture, Defendants.

To the Honorable, the Judges of the District Court of the  
United States, in and for said District.

Your orator complains and says:

First. That your orator, the St. Louis Independent Pack-  
ing Company, is a corporation duly organized and existing  
under the laws of the State of Missouri, and that it owns and  
operates a slaughtering establishment in the City of St. Louis,  
within the State of Missouri, at which plant it conducts the  
business of slaughtering cattle, sheep and hogs and manufac-  
tures a meat food product commonly styled and designated as  
sausage.

Second. That the defendant David F. Houston is Secre-  
tary of Agriculture, and the defendant A. D. Melvin is Chief

of the Bureau of Animal Industry of the Department of Agriculture; and that James J. Brougham is Chief Inspector of said Bureau of Animal Industry with headquarters at the City of St. Louis, each duly appointed, qualified and acting; and that this Court has jurisdiction of this suit because it involves the construction of a Federal Statute, to-wit: the Act of Congress commonly known as Meat Inspection Amendment contained in the Act of Congress entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30th, 1907", approved June 5 30th, 1906, and all acts supplementary thereto or amendatory thereof.

Third. That the business of your orator in the manufacture and sale of such meat food product under the name and style of sausage is very extensive, and that said products are, and for many years last past have been, sold extensively by your orator in the State of Missouri, and divers others of the United States, and that your orator in the sale of such products is engaged in interstate commerce.

Fourth. That your orator during the current year, and for many years last past, has sold to the retail dealers and others in the State of Missouri, and divers others of the United States, sausage under various distinctive trade names or brands, aggregating many hundred thousand dollars annually; that among the meat food products manufactured by your orator more than...kinds of sausage have been extensively manufactured and sold by your orator, among which are the following, to-wit:

And your orator avers that for many years it has carried on its said establishment, as aforesaid, and throughout divers of the United States has done a large and profitable business in the sale of sausage; that said business has been established at a very great expenditure of money, and that the capital of your orator invested in its business is in excess of one million dollars, a large part of which, to-wit, approximately one-tenth, is required for the conduct of its business in the manufacture and distribution of sausage; that your orator has, by sound business methods and a liberal investment of capital, established throughout divers of the United States a large and profitable trade and business in the sale of sausage, as aforesaid, and that for more than five years your orator has had regular customers and patrons for the same, and that such customers and patrons are, and have been at all times, wholly satisfied with the quality of sausage manufactured and sold by your orator.



Fifth. Your orator further says that its said sausages are compounds and mixtures, composed and manufactured from meat of hams, pork, spices and cereals, if the sausage so manufactured be of the type known as "fresh pork sausage"; and from beef, ham, pork, cereals, spices and other ingredients, if under the ordinary type of Bologna or Frankfurt style sausage; each mixture and compound depending upon the kind and character of the sausage manufactured; and that the amount of cereal used in said compounds and mixtures going to the preparation and making of said sausages is from one to ten per cent of wholesome cereal, and a varying amount of pure water, depending upon the meat used and the amount necessary for the compounding and mixture of the various ingredients; and that said cereal is not an inferior substance than the other ingredients entering into the compound or mixture composing sausages, but that said cereal is composed of ground grain; and that the sausages thus manufactured by your orator are sound, healthful, wholesome, and contain no dyes, chemicals, preservatives or ingredients which render such meat food products unsound, unhealthful, unwholesome or unfit for human food.

Sixth. Further your orator shows that the use of cereal and water, as aforesaid, in the manufacture of sausage is customary and necessary, and has been universally recognized by all manufacturers thereof for more than fifty years, and ever since sausages have been known as a commercial product.

Seventh. That on October 1, 1906, at which time the Act of Congress commonly known as the Meat Inspection Amendment, contained in the Act of Congress entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1907", approved June 30, 1906, went into effect, the Secretary of Agriculture, claiming to act under the authority of said Act of Congress, established at the said plant of your orator, located in the City of St. Louis, a system of inspection, whereby the entire operation of your orator's plant was under the charge of the inspector assigned by the Bureau of Animal Industry, one of the Bureaus of said Department of Agriculture, to supervise its official work at its official station, situated in the City of St. Louis in the State of Missouri, and of such assistant inspectors as said chief inspector should, from time to time, designate, and thenceforth until the date hereof no operations of your orator's plant have been carried on, by day or by night, except under the direct supervision of said inspector or inspectors, to whom your orator was required to furnish, free of charge, an office, including light and heat, and

that your orator has in all respects complied with the said Act and with all prior regulations of the Secretary of Agriculture thereunder, and your orator alleges that it is desirous of complying with all future regulations which may lawfully be made thereunder.

Eighth. That, assuming to act under the authority of the said Meat Inspection Amendment, as aforesaid, the Bureau of Animal Industry of the said Department of Agriculture, its action with respect thereto having in each and every instance received the approval of the Secretary of Agriculture has promulgated and made effective certain regulations covering the meat inspection of the United States Department of Agriculture, which regulations have prescribed in great detail the method to be followed in the manufacture of meat food products, including sausage; that the use of cereal as a legitimate constituent in the manufacture of sausage has been specifically recognized, from time to time, in the regulations and Service Announcements promulgated by virtue of the authority conferred upon the Secretary of Agriculture, as aforesaid; that in the service Announcement of said Bureau of Animal Industry, dated April 15, 1912, at page 26, it was said:

8 "Labels for meat and meat food products to which cereal, potato flour, or similar substances are added will in the future be required to have the statements 'Cereal added,' 'Potato flour added,' etc., appear thereon in type in such size as will be in good proportion to the name of the product, provided the product does not contain more than five per cent of cereal, potato flour, etc. If this percentage is exceeded, the words 'cereal', 'Potato flour', etc., must appear as a part of the name of the product in the same size and style type and on the same line; for example, 'sausage and cereal', 'Sausage and potato flour.' "

That in the Service Announcement issued by the said Bureau, pursuant to the authority above described, under date of July 15, 1912, at page 56, it is said:

"Referring to instructions in Service Announcements of April 15, 1912, page 26, under the heading 'Labeling of meat and meat food products containing added substances,' attention is called to the fact that this applies to ink brands and burning brands as well as to labels, cartons, etc. Such brands should bear the statement 'sausage and cereal' if cereal is added in excess of five per cent, or 'Cereal added' if not in excess of five per cent."

That pursuant to the requirements of the said regulations and Service Announcements, as aforesaid, your orator has

expended large sums in the preparation of labels, cartons and containers of divers kinds and descriptions, in form as provided for in and by the said regulations and Service Announcements, which said Cartons, brands and containers will be and become of no value whatsoever to your orator if it be required to conduct its business of the manufacture of sausage pursuant to the terms and provisions of a certain regulation heretofore promulgated by the said Secretary of Agriculture, effective April 1, 1913, and hereinafter more fully described.

Ninth. That the said Secretary of Agriculture, assuming to act under and by virtue of the Meat Inspection Amendment, as aforesaid, has promulgated the following regulation, and made the same effective on the first day of April, 1913, to-wit:

9

“Washington D. C., Feb. 28, 1913.

For the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive name, under the authority conferred on the Secretary of Agriculture by the provisions of the act of Congress, approved June 30, 1906, (34 Stat. 674), Regulation 18 is hereby amended by the addition of sections 15 and 16, to read as hereinafter set out.

JAMES WILSON,

Secretary of Agriculture.”

(Section 16, paragraph 1) “Sausage shall not contain cereal in excess of two per cent: When cereal is added its presence shall be stated on the label or on the product.”

(Paragraph 2) “Water or ice shall not be added to sausage, except for the purpose of facilitating grinding, chopping and mixing, in which case the added water or ice shall not exceed three per cent, except as provided in the following paragraph:”

(Paragraph 3) “Sausage of the class which are smoked or cooked, such as Frankfurt style, Vienna style and Bologna style, may contain added water in excess of three per cent, but not in excess of an amount sufficient to make the product palatable. When water (in excess of three per cent) and cereal are added to this class of sausages the statement ‘Sausage, water and cereal’ shall appear on the label or on the product, but when no cereal is added the addition of water need not be stated.”

Tenth. That the said Bureau of Animal Industry, acting through its chief, Doctor A. D. Melvin, with the approval of the Secretary of Agriculture, has ordered the Chief Inspector of said Bureau in charge of the inspection of said meat food products at the establishment of your orator, so being carried on in manner and form as above described, to refuse to mark as "inspected and passed" all sausage, of various kinds or styles, manufactured by your orator, unless same shall be manufactured in compliance with the regulation above described, and thus to deny to your orator the right to ship the said sausage in interstate trade and commerce, notwithstanding that the said Meat Inspection Amendment, as aforesaid, provides that "said inspectors shall mark, stamp, tag or label as 'inspected and passed' all such products found to be sound, healthful, wholesome, and which contain no dyes, chemicals, preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome or unfit for human food."

10 Eleventh. Your orator further shows that, assuming to act pursuant to the authority and directions of the aforesaid regulations effective on April 1, 1913, the local inspectors carrying on the work of inspection in the establishment of your orator, as provided for under and by virtue of the terms of said Meat Inspection Amendment, have refused to mark as "inspected and passed," and are threatening to mark as "inspected and condemned", certain meat food products manufactured by your orator, known as sausage of various styles, which are sound, healthful and wholesome, and contain no dyes, chemicals, preservatives or ingredients which render such meat food products either unsound, unhealthful, unwholesome or unfit for human food, for the sole reason that said sausage contains cereal in excess of two per cent and that water in excess of three per cent was added to the other ingredients; that while the percentage of cereal used therein exceeds two per cent and the percentage of water therein exceeds three percent, neither the percentage of cereal nor of water therein is greater than is requisite and necessary to properly manufacture such sausage and to produce a savory and palatable article of food, and such as is demanded by your orator's trade and customers, nor does the amount of cereal and water so used in the manufacture of said sausage in any way impair the food value of the product or its healthfulness and wholesomeness as a food; that until the adoption of said regulations which became effective on April 1, 1913, by the Department of Agriculture, there was no attempt by said Department or any of its officers to in any way interfere with or control the percentage of either cereal or water so used

in the manufacture of sausage, but on the contrary, sausage containing cereal in excess of two percent and water in excess of three per cent has been, ever since the adoption of the Meat Inspection Amendment "inspected and passed" by the Government officers; and that the sausage of your orator which the said inspectors have threatened to mark as "inspected and condemned", fully answers and complies with the requirements of existing law.

- 11 Twelfth. Your orator further shows that great, irreparable and continuing loss and damage to the business of your orator in divers of the United States has been caused, and is continuing to be caused, by the said action of the inspectors of the Bureau of Animal Industry of the Department of Agriculture in refusing to mark meat food products of your orator as having been "inspected and passed", as aforesaid, which loss and damage your orator cannot estimate, calculate or compute, and that said loss and damage is a continuing loss and damage, and that unless the said defendants, their assistants, deputies, clerks, agents or representatives, and each of them, are restrained by an order of this Court from continuing so to refuse to mark as "inspected and passed" the said meat food products of your orator which are sound, healthful, wholesome, and which contain no dyes, chemicals, preservatives or ingredients which render such meat food products unsound, unhealthful, unwholesome or unfit for human food, their action in such respect will completely ruin the business of your orator in the manufacture and sale of sausage in interstate as well as intra state commerce in this; that the enforcement of the aforesaid regulations will practically prohibit entirely the use of cereal as an ingredient in sausage, because it is impossible to use cereal with as little as three percent of water and produce a palatable and commercial sausage; that sausage manufactured in accordance with said regulations will be [harded], drier and tougher and less palatable and toothsome than the sausage manufactured by your orator prior to April 1, 1913, and the cost price thereof will be at least from ten to fifteen percent higher; that your orator has built up a large and extensive trade and custom both in the State of Missouri and in other States for various kinds of sausage manufactured by it prior to April 1, 1913, under the regulations and inspection of the Department of Agriculture then in force, at great cost and expense; that the enforcement of the aforesaid regulations, effective on April 1, 1913, will wholly destroy its said trade and custom by preventing it from furnishing and supplying the quality and grade of sausage demanded by said trade and by compelling it to charge higher prices
- 12

for the sausage it may make, and will also wholly disable it from selling and marketing its sausage in competition with manufacturers either in the State of Missouri or in other States, whose business is wholly intra state and therefore not subject to said regulations; that in order to retain its said trade and customers your orator is obliged to supply them daily and from day to day with sausage of the kind and quality it was in the habit of furnishing them with prior to April 1, 1913, and which was approved and passed by said Secretary of Agriculture, and unless it is permitted and enabled so to do, its sausage business will be wholly destroyed and lost; that the enforcement of said regulations will render useless and of no value the labels cartons and containers heretofore purchased by your orator at great expense in reliance on the prior regulations [to] orders of said Secretary of Agriculture. The loss occasioned thereby is irreparable, and cannot be correctly ascertained or estimated; and further, that your orator has no remedy except in a court of equity, where the matters herein stated are properly cognizable.

Thirteenth. Your orator avers and charges that under the laws of the United States, and particularly pursuant to the provisions of the Meat Inspection Amendment, as aforesaid, it is the duty of the inspectors appointed, pursuant to the provisions of the said Act, to mark, stamp, tag, or label as "inspected and passed" all sausage manufactured by your orator from products which are sound, healthful and wholesome and which contain no dyes, chemicals, preservatives or ingredients which render such sausage unsound, unhealthful, unwholesome and unfit for human food; that the regulation purporting to limit the amount of cereal and water used in the manufacture of sausage, compliance with which is made

13 a prerequisite to the stamping and passing of the product of your orator, as aforesaid, it is not within the scope of the authority conferred on the Secretary of Agriculture by the terms and provisions of the Meat Inspection Amendment, is null and void and cannot lawfully be used as the basis for withholding the inspection legend from the products of your orator.

Fourteenth. That the value of the matter in controversy exceeds the sum of five thousand dollars, exclusive of interest and costs, and that your orator is without any remedy at law.

Forasmuch, Therefore, as your orator is without remedy in the premises, except in a court of equity, and to the end that said Honorable David F. Houston, Secretary of Agriculture; Dr. A. D. Melvin, Chief of the Bureau of Animal Industry; and James J. Brougham, Chief Inspector of the Bureau of

Animal Industry of the Department of Agriculture at St. Louis, who are made parties defendant to this bill of complaint, may be required to make full and true answer to the same (but not under oath, each of their answers under oath being hereby expressly waived), and that this court will grant to your orator the writ of injunction hereinafter prayed for, and such other and further relief in the premises as equity may require and to this Honorable Court may seem meet.

(a) Your orator prays a temporary injunction (to be made permanent upon a final hearing of this cause) restraining Honorable David F. Houston, Secretary of Agriculture, Doctor A. D. Melvin, Chief of the Bureau of Animal Industry, and James J. Brougham Chief Inspector of the Bureau of Animal Industry of the Department of Agriculture at St. Louis, and their and each of their assistants, deputies, inspectors, employes, representatives, and clerks, from refusing to mark, stamp, tag or label as "inspected and passed" all meat food products or sausage manufactured by your orator found to be sound, healthful and wholesome and which contain no dyes, chemicals preservatives or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome or unfit for human food.

14 (b) That Honorable David F. Houston, Secretary of Agriculture, Doctor A. D. Melvin, Chief of the Bureau of Animal Industry, and James J. Brougham Chief Inspector of the Bureau of Animal Industry of the Department of Agriculture at St. Louis, the defendants above named, be required by temporary mandatory injunction (to be made permanent upon a final hearing of this cause) to mark, stamp, tag or label as "inspected and passed" all the meat food products or sausage manufactured by your orator found to be sound, healthful and wholesome and which contain no dyes, chemicals, preservatives or ingredients which render said meat or meat food products unsound, unhealthful unwholesome or unfit for human food.

(c) That the amendment to prior existing regulations covering meat inspection of the United States Department of Agriculture, effective April 1, A. D. 1913, hereinbefore set out and referred to, be declared to be unauthorized by law, null and void, and of no force and effect whatsoever.

(d) That upon the final hearing of this cause the temporary injunction prayed for may be made permanent, and that your orator may have such other and further relief in the premises as it may be entitled to or as to the court may seem meet.



(e) That this Court grant plaintiff a writ of subpoena of the United States of America, issuing out of and under the seal of the Court, directed to said David F. Houston, Secretary of Agriculture, Doctor A. D. Melvin, Chief of the Bureau of Animal Industry, and James J. Brougham, Chief Inspector of the Bureau of Animal Industry of the Department of Agriculture at St. Louis, commanding them, and each of them, upon a day certain, to be named therein, under penalty to be and appear in this Honorable Court, then and there to answer, all and singular, the charges herein named, but not under oath, their, and each of their answers under oath being expressly waived, and to stand to and perform and abide such further order, direction and decree of this Court as may be  
15 against them, and as in duty bound plaintiff will ever pray.

FRANLIN FERRISS,  
JOSEPH H. ZUMBALEN,  
HENRY T. FERRISS,  
MATT G. REYNOLDS,  
Solicitors for Plaintiff.

State of Missouri,  
City of St. Louis—ss.

Gustav Bischoff, being first duly sworn, on oath deposes and says that he is the President of the St. Louis Independent Packing Company, the corporation complainant in the foregoing bill of complaint; that he knows the contents and allegations thereof; that [that] statements therein contained are true, except as therein stated to be upon information and belief, and as to those statements deponent believes them to be true.

GUSTAV BISCHOFF.

Subscribed and sworn to before me this 5th day of April,  
A. D. 1913.

My term expires Aug. 29, 1914.

(Seal)

M. A. HALDEMAN,  
Notary Public.

Endorsed: "Filed April 7th, 1913, W. W. Nall, Clerk."

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16 (Order denying Temporary Injunction. April 12, 1913.)

The Court having fully considered the application of the said complainant for the granting of a temporary injunction in this cause, doth order that said application be and the same is hereby denied. Opinion filed.

April 12th, 1913.

(Signed) DAVID P. DYER,  
Judge

Endorsed: "Filed, Apr. 12, 1913, W. W. Nall, Clerk."

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(Mandate of U. S. Circuit Court of Appeals. Filed in the District Court on July 28, 1914.)

United States of America—ss.

The President of the United States of America, To the Honorable the Judges of the District Court of the United States for the Eastern District of Missouri—Greeting:  
(Seal)

Whereas, lately in the District Court of the United States for the Eastern District of Missouri, before you, or some of you, in a cause between the St. Louis Independent Packing Company, a corporation, Complainant, and Honorable David F. Houston, Secretary of Agriculture; A. D. Melvin, Chief of the Bureau of Animal Industry of the Department of Agriculture; and James J. Brougham, Chief Inspector of the Bureau of Animal Industry of the Department of Agriculture, Defendants, wherein the decree of the said District Court in said cause, entered on the 12th day of April, A. D. 1913, was in the following words, viz:

"The Court having fully considered the application of the said complainant for the granting of a temporary injunction in this cause, doth

Order that said application be and the same is hereby denied.

Opinion filed.

April 12th, 1913.

(Signed) DAVID P. DYER,  
Judge."

17 as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals, Eighth Circuit, by virtue of an appeal, agreeably to the act of Congress, in such case made and provided, fully and at large appears;

And Whereas, at the May term, in the year of Lord one thousand nine hundred and fourteen, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the transcript of the record from the said District Court, and was argued by counsel.

On consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in [in] this cause, be, and the same is hereby, reversed without costs to either party in this Court.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to issue an injunction restraining the Chief Inspector of the Bureau of Animal Industry in charge of plaintiff's plant from refusing to mark complainant's product as "inspected and passed," upon the ground that it contains cereal in excess of two per cent or water in excess of three per cent, so long as it is marked "Cereal added" or "Sausage and Cereal" as now or hereafter required by regulation of the Secretary of Agriculture, and if the Secretary of Agriculture shall hereafter require that the product shall be marked "Water added," or with the amount of water added, the preliminary decree shall be subject to be modified accordingly.

May 27, 1914.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

18      Witness, the Honorable Edward D. White, Chief Justice of the United States, the twenty-eighth day of July, in the year of our Lord one thousand nine hundred and fourteen.

JOHN D. JORDAN,  
Clerk of the United States Circuit  
Court of Appeals, Eighth Circuit.

Endorsed: "Filed, Jul. 28, 1914, W. W. Nall, Clerk."

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19      (Separate Answer of the Defendant, David F. Houston, Filed in the District Court on June 21, 1915.)

Now comes the above named defendant, David F. Houston, and for his separate answer to the bill of complaint filed in this cause states:

First. Defendant for answer to the first paragraph of the bill admits that the plaintiff is a corporation and is conducting business as alleged in the first paragraph of the bill.

Second. Defendant for answer to the second paragraph of the bill admits that he is Secretary of Agriculture, that A. D. Melvin is Chief of the Bureau of Animal Industry of the Department of Agriculture, and that James J. Brougham is Chief Inspector of said Bureau of Animal Industry, with headquarters at St. Louis, Missouri, all as alleged in the second paragraph of the bill.

Further answering said paragraph, this defendant avers that this suit involves the validity of regulations made by the Secretary of Agriculture, pursuant to authority conferred on him by a Federal statute, to-wit: the Meat Inspection Act, mentioned in said second paragraph; and that, otherwise than to determine whether said statute empowered the Secretary of Agriculture to make said regulations,  
20 this suit does not involve the construction of a Federal statute, and this Court has no jurisdiction of this suit.

Third. Defendant for answer to the third paragraph of the bill admits that plaintiff is engaged in business as alleged in the third paragraph of the bill.

Fourth. Defendant for answer to the fourth paragraph of the bill states that he is without knowledge as to whether plaintiff has, during the year 1913, and for many years prior thereto, sold to retail dealers or others in the State of Missouri, or any other States, sausage under various trade names or brands, as alleged in the fourth paragraph of the bill; and further answering said paragraph, defendant states that he is without knowledge as to whether plaintiff has done a large or profitable business in the sale of sausage or that plaintiff's said business has been established at a great expenditure of money, as alleged in said paragraph.

And defendant, further answering said paragraph, denies that plaintiff has sold sausage aggregating many hundreds of thousands of dollars annually; and denies that plaintiff has invested in its business more than a million dollars, or that a large part thereof, to-wit, one-tenth, is required for the conduct of its business in the manufacture and distribution of sausage; he further denies that plaintiff has by sound business methods or a liberal investment of capital established throughout the United States a large or profitable trade in the sale of sausage, or that for more than five years plaintiff has had regular customers and patrons for the same, or that said customers and patrons are, or have been at all times,

wholly satisfied with the quality of the sausage manufactured and sold by plaintiff.

And the defendant, further answering said fourth paragraph, states that the allegations in said paragraph that the plaintiff has established a large and profitable business  
21 in the sale of sausage, and has regular customers and patrons who have at all times been wholly satisfied with the quality of the sausage manufactured and sold to them by plaintiff are wholly immaterial to any issue involved in this cause and furnish no ground for the relief prayed for, and that said allegations ought to be stricken from the bill and disregarded by the Court, and defendant so moves the Court.

Fifth. Defendant for answer to the fifth paragraph of the bill, admits that a portion of the sausages manufactured by plaintiff are compounds and mixtures composed and manufactured in part from meat of hams, pork, spices and cereals, if the sausage is of the type known as "fresh pork sausage," and from beef, ham, pork, cereals, spices and other ingredients, if under the style known as "Bologna" or "Frankfurt" sausage; that the amount of cereals used in said compounds and mixtures composing said sausage is as much as from 1 to 10 per cent of cereals, and that varying amounts of water are also used. And defendant alleges that the amount of water so used by plaintiff often equals 20 to 40 per cent of the finished product.

And the defendant further answering said paragraph, denies that the cereal so used by plaintiff is wholesome; denies that the amount of water used depends upon the meat used or the amount necessary for the compounding or mixture of the various ingredients; denies that said cereal is composed of ground grain; and denies that the sausages manufactured by plaintiff as alleged therein are sound, healthful, or wholesome; and denies that said sausages contain no ingredients which render the sausages unsound, unhealthful, unwholesome, or unfit for human food.

And defendant, further answering said paragraph states that cereal is a substance which is inferior to the other ingredients composing the sausages manufactured by plaintiff.

22 Sixth. Defendant for answer to the sixth paragraph of the bill, denies that the use of cereal and water as stated in said bill in the manufacture of sausage is customary or necessary, and denies that it has been universally recognized by all manufacturers thereof for more than fifty

years, or ever since sausages have been known as a commercial product.

And the defendant, further answering said paragraph, states that the allegations therein are immaterial to any right or issue involved in this cause and constitute no ground for the relief prayed for in the bill, and ought to be stricken from the bill and disregarded by the Court, and defendant so moves the Court.

Seventh. Defendant for answer to the seventh paragraph of the bill, admits that on October 1, 1906, at which time the Act of Congress referred to in the seventh paragraph of said bill went into effect, the then Acting Secretary of Agriculture, acting under the authority of said Act of Congress, established at plaintiff's plant in the City of St. Louis, Missouri, a system of inspection, and that inspectors were assigned to the supervision of said plant, as alleged in the seventh paragraph of the bill.

The defendant, further answering said paragraph, denies that plaintiff in all respects complied with the said Act of Congress or the regulations of the Secretary of Agriculture promulgated thereunder, and denies that plaintiff is desirous of complying with all future regulations that may be lawfully made thereunder.

Eighth. Defendant for answer to the eighth paragraph of the bill admits that the Secretary of Agriculture promulgated and made effective certain regulations covering the meat inspection of the Department of Agriculture. Defendant admits that the service announcements of the Bureau of Animal Industry of the Department of Agriculture, dated 23 April 15, 1912, and July 15, 1912, were promulgated as alleged in said paragraph.

Defendant, further answering said paragraph, denies that said regulations prescribe in great detail the method of manufacturing sausage; denies that the use of cereal as a legitimate constituent in the manufacture of sausage has been recognized in said regulations and service announcements; denies that pursuant to the requirements of the said regulations and announcements plaintiff has expended large sums of money in the preparation of labels, cartons, or containers in form provided by the said regulations and announcements, and denies that said cartons, brands, or containers will be of no value if plaintiff be required to conduct its business as required by the regulation effective April 1, 1913, as alleged in said paragraph.

And the defendant, further answering said paragraph states that the Bureau of Animal Industry of the Department of Agriculture has issued and promulgated a letter of instructions providing that such labels, cartons, brands, and containers may be corrected and changed so that the same may be used in a manner which will conform to the said regulations.

Ninth. Defendant admits that the Secretary of Agriculture, acting under and by virtue of the said meat inspection act, promulgated the regulations and made the same effective on the 1st of April, 1913, as alleged in the ninth paragraph of the bill.

Tenth. Defendant, for answer to the tenth paragraph of the bill, admits that the Bureau of Animal Industry, acting through its Chief, Dr. A. D. Melvin, with the approval of the Secretary of Agriculture, ordered James J. Brougham, who is in charge of the meat inspection work at the establishment of plaintiff, to refuse to mark as "Inspected and passed" all  
24 sausages of various kinds or style manufactured in plaintiff unless such sausages shall be manufactured in compliance with the regulation set forth in the ninth paragraph of the bill.

Defendant, further answering said paragraph, admits that the Meat Inspection Act provides that inspectors shall mark, stamp, tag, or label, as "Inspected and passed" all meat food products which are found to be sound, healthful, and wholesome and which contain no dyes, chemicals, preservatives or ingredients which render such meat food products unsound, unhealthful, unwholesome, or unfit for human food; but defendant states that said Act also provides that:

no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted.

and said Act further provides that—

said Secretary of Agriculture shall, from time to time make such rules and regulations as are necessary for the efficient execution of the provisions of this act, and all inspections and examinations made under this act shall be such and made in such manner as described in the rules and regulations prescribed by the Secretary of Agriculture not inconsistent with the provisions of this act.

Further answering said paragraph, defendant states that said regulation set forth in the ninth paragraph of the bill was made pursuant to the aforesaid provisions of the said Meat Inspection Act and, therefore, denies the allegation in the tenth paragraph of the bill that the order of the Bureau of Animal Industry to the Inspector in Charge of said Bureau at St. Louis, Missouri, denies or has denied to the complainant any right to ship sausage in interstate trade or commerce, or any other right; and further denies that the defendant, James J. Brongham, or any other inspector, is required by said Meat Inspection Act, or otherwise, to mark as "Inspected and passed" any meat food product that is sound, healthful and wholesome and contains no dyes, chemicals, or preservatives, or ingredients which render the same unsound, unhealthful, unwholesome, or unfit for human food, if such food product is manufactured or offered for sale under any false or deceptive name, or otherwise fails in any respect to comply with any provision of said Act or of said regulations.

Eleventh. Defendant, for answer to the eleventh paragraph of the bill, admits that the local inspectors of the Bureau of Animal Industry carrying on the work of inspection in the establishment of plaintiff, acting in pursuance of the authority given them by the regulation referred to in said paragraph, effective April 1, 1913, have refused to mark as "Inspected and passed" certain meat food products manufactured by plaintiff known as sausage of various styles, for the reason that said products contained cereal in excess of two per cent and water in excess of three per cent.

And the defendant, further answering said paragraph, denies that the said sausages or any of them were sound, healthful, wholesome or fit for human food. Defendant admits that the percentage of cereal used in the sausages exceeded two per cent and the percentage of water therein exceeded three per cent, but states that both the percentage of cereal and the percentage of water therein were greater than was requisite or necessary properly to manufacture or produce a savory or palatable article of food, such as is demanded by plaintiff's trade and customers.

Defendant further denies that the amount of cereal and water so used in the manufacture of said sausage did not in any way impair the food value of the product or its healthfulness or wholesomeness as a food.

Defendant further denies that until the adoption of said regulation had become effective on April 1, 1913, there was

no attempt made by the Department of Agriculture, or  
26 any of its officers, in any way to interfere with or control the percentage of any cereal or water used in the manufacture of sausage.

And defendant further denies that the said sausage manufactured by plaintiff mentioned in said paragraph fully answered or complied with the requirements of the existing law.

Defendant, further answering said paragraph, denies that said local inspectors, or any of them, threatened to mark as "Inspected and condemned" any of the meat food products known as sausage mentioned in said paragraph as having been manufactured by plaintiff.

Twelfth. Defendant, for answer to the twelfth paragraph of the bill, denies that great, irreparable or continued loss or damage to the business of plaintiff in divers or any of the United States has been caused or is continuing to be caused by reason of the action of the defendant in refusing to mark meat food products of plaintiff as having been "Inspected and passed," or that plaintiff is unable to estimate calculate, or compute such loss or damage, or that such loss or damage is a continuing loss or damage.

Defendant further denies that unless he is restrained by an order of this Court from continuing to refuse to mark as "Inspected and passed" the said meat food products of plaintiff such action will completely or at all ruin the business of plaintiff in the manufacture or sale of sausage.

Defendant further denies that the said meat food products mentioned in said paragraph are sound, healthful, wholesome, or fit for human food.

Defendant further denies that the enforcement of the said meat inspection regulation, effective April 1, 1913, will prohibit entirely the use of cereal as an ingredient in sausage; and defendant further denies that it is impossible to produce a palatable or commercial sausage by the use of cereal therein with as little as three per cent of water.

27 Defendant further denies that such sausage manufactured in accordance with said regulation will be harder, drier, or tougher or less palatable or toothsome than the sausage manufactured by plaintiff prior to April 1, 1913, and denies that the cost price of said product will be at least from 10 to 15 per cent higher when such product is manufactured in accordance with the requirements of said regulations.



And defendant states that said allegations in the bill are immaterial to any issue involved in this cause and furnish no ground for the relief prayed for and ought to be stricken from the bill and disregarded by the Court, and the defendant so moves the Court.

Defendant states that he is without knowledge as to whether plaintiff has built up a large or exclusive trade or custom either in the State of Missouri or in other States for various kinds of sausages manufactured by plaintiff prior to April 1, 1913, under the regulation and inspection of the Department of Agriculture then in force at great expense or cost, as alleged in said paragraph. And defendant says that said allegations in said bill are immaterial to any issue involved in this cause and furnished no ground for the relief prayed for and ought to be stricken from the bill and disregarded by the Court, and the defendant so moves the Court.

Defendant further denies that the enforcement of the aforesaid regulation effective April 1, 1913, will wholly, or at all, destroy plaintiff's trade or custom by preventing plaintiff from furnishing or supplying the quality or grade of sausage demanded by said trade or by compelling plaintiff to charge higher prices for the sausages plaintiff makes in the manner as alleged in said paragraph. Defendant denies that said regulation will wholly, or at all, disable plaintiff from selling or marketing sausage in competition with other manufacturers; and denies that in order for plaintiff to retain its trade or customers plaintiff will be obliged to  
28 supply them daily, or from day to day, with sausage of the kind or quality plaintiff was in the habit of furnishing them prior to April 1, 1913, or unless plaintiff is permitted or enabled so to do, his sausage business will be wholly, or at all, destroyed or lost. And defendant says that said allegations in said bill are impertinent to any issue in this cause and furnished no ground for the relief prayed for and ought to be stricken from the bill and disregarded by the Court, and the defendant so moves the Court.

Defendant further denies that the enforcement of the said regulation effective April 1, 1913, will render useless or of no value the labels, cartons, or containers heretofore purchased by plaintiff in reliance on the prior regulations or orders of the Secretary of Agriculture.

And defendant, further answering said paragraph, denies that plaintiff has suffered or will suffer irreparable loss, or any loss which cannot be correctly ascertained or estimated, by reason of the enforcement of said regulation.

Thirteenth. Defendant denies that it is the duty of inspectors appointed pursuant to the provisions of the meat inspection act to mark, stamp, tag, or label as "Inspected and passed" all or any sausage manufactured by plaintiff from products which are sound, healthful, wholesome, or fit for human food and which contain no dyes, chemicals, preservatives, or ingredients which render such product unsound, unhealthful, unwholesome, or unfit for human food.

Defendant further denies that the said regulation limiting the amount of cereal and water used in the manufacture of sausage is null and void or cannot lawfully be used as a basis for withholding the inspection legend from the products of plaintiff, as alleged in said paragraph, and defendant states that the said regulation is within the scope of the authority conferred upon the Secretary of Agriculture by the terms and provisions of the meat inspection act and is, therefore, valid.

Fourteenth. Defendant, for answer to the fourteenth paragraph of the bill, avers that he is without knowledge as to whether the value of the matter in controversy in said cause exceeds the sum of Five Thousand Dollars (\$5,000), exclusive of interest and costs, or that plaintiff is without any remedy at law, as is alleged by plaintiff in said paragraph.

Defendant, for further answer to the said bill, states that it is not true, as alleged in said bill, that plaintiff's business in the manufacture and sale of sausage will be completely, or at all ruined or wholly, or at all, destroyed or lost, or that plaintiff will be wholly, or at all, disabled from selling its sausage in competition with other manufacturers of sausage, if said regulation, effective April 1, 1913, is enforced by this defendant, but, on the contrary, defendant alleges that this plaintiff for a long time has been and is now engaged in the manufacture and sale of sausage which does not contain any cereal or added water, and has been and is engaged in selling the same in interstate commerce, and particularly in the State of Pennsylvania, in which State there is a statute prohibiting the sale of sausage containing any cereal, which statute is entitled "An Act providing for the protection of public health and prevention of fraud and deception, by prohibiting the sale, the offering for sale, the exposing for sale, or the having in possession with intent to sell, of adulterated or deleterious sausage; defining sausage, and prescribing the penalty for the violation thereof;" approved April 6, 1911;

and that said plaintiff has been and is selling large quantities of said sausage in Pennsylvania in conformity with the said law of said State, and in other States.

30 Defendant, further answering, states that the manufacture and sale of a product as sausage which product contains added cereal and water in quantities as described in plaintiff's bill, or in any quantities in excess of the amount designated in said regulation, effective April 1, 1913, is false and deceptive; that the ordinary consumer of sausage manufactured by this plaintiff has no knowledge or information that sausage contains cereal and added water, that such information is not conveyed to persons who purchase plaintiff's sausage at retail by any method of marking or branding now or heretofore in use by plaintiff, and that it is impracticable and impossible in the ordinary course of manufacture and distribution of sausage to mark or brand the same so that the purchaser at retail or the consumer will be informed as to the amount of cereal and water added thereto.

Defendant, further answering, states that the addition of cereal and water to sausage has for many years been condemned and disapproved by many authoritative writers and various well known organizations familiar with and concerned in the manufacture and sale of sausage in this country and other countries; that such views and opinions of said writers and organizations have been widely published and discussed, and that this plaintiff knew, or in the reasonable and lawful conduct of its business ought to have known, of such views and opinions, and that such use of cereal and water in the manufacture of sausage constitutes a fraud and deception upon the purchaser and consumer, and the plaintiff as a manufacturer of sausage was and is in duty bound to conform its business to the requirements and provisions of said Act of Congress and of said regulations of the Secretary of Agriculture, and that because of these facts no surprise, hardship, or injustice has been or will be sustained by or done to this plaintiff by the enforcement of said regulation.

31 Defendant, further answering, states that since the filing of this suit and previous to the service of the subpoena on him in said cause the regulations set forth in paragraph 9 of the bill had been superseded by regulations governing the meat inspection of the United States Department of Agriculture, contained in B. A. I. Order 211, which were promulgated on July 15, 1914, by the Secretary of Agriculture, pursuant to the authority conferred upon him by the said

Meat Inspection Act, and effective on and after November 1, 1914, and that a copy of said regulations will be produced at the hearing of this cause.

Wherefore, having fully answered, this defendant prays that no temporary or permanent order or decree be made against him in this cause and that he be discharged with costs.

DAVID F. HOUSTON,

Defendant.

By Arthur L. Oliver,  
United States Attorney.

Wm. Woodward,  
Asst. United States Attorney.

Endorsed: "Filed, Jun. 21, 1915, W. W. Nall, Clerk."

32

(Final Decree. March 20, 1916.)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

St. Louis Independent Packing Company, a corporation,  
Complainant.

No. 4156. vs. In Equity.

Honorable David F. Houston, Secretary of Agriculture; A. D. Melvin, Chief of the Bureau of Animal Industry of the Department of Agriculture; and James J. Brougham, Chief Inspector of the Bureau of Animal Industry of the Department of Agriculture, Defendants.

This cause having come on to be heard at the preceding September Term 1915 of this District Court, and having been tried before and submitted to the Court upon the pleadings filed by said complainant and by defendants Houston and Brougham (defendant Melvin not being served with process nor appearing in the cause) and upon the arguments and briefs of counsel for the said parties respectively, the Court being now fully advised in the premises, doth find the issues herein joined in favor of the said appearing defendants and against the said complainant, as set forth in the Opinion this day filed herein; it is therefore now

Ordered, Adjudged and Decreed that the bill of complaint in this cause be and the same is hereby finally dismissed, at

the costs of said complainant, for which costs let execution issue as at law.

March 20th, 1916.

(Signed) DAVID P. DYER,  
Judge.

Endorsed: "Filed, March 20, 1916, W. W. Nall, Clerk."

33 (Opinion of the District Court, filed March 20, 1916.)

Dyer, J.

The complainant's bill now stands as it did when first presented to the court on an [pplication] for a mandatory injunction to restrain the defendants from refusing to mark as "Inspected and passed" all sausage manufactured by complainant, and to have the court declare void a regulation promulgated by the Secretary of Agriculture on February 28, 1913.

There has been no change whatever in any of the averments. It was upon the bill as it now stands that the court refused an injunction, and it was upon the averments in that bill alone that the Court of Appeals acted in reversing the judgment of this court. The court of Appeals in the opinion filed by it, said:

"Basing all our statements upon the allegations of the bill, which have never been controverted, sausage and cereal which contain no dyes, chemicals, preservatives or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome and unfit for human food, and which is not by any other reason unsound, unhealthful, unwholesome or unfit for human food, is not subject to condemnation under the meat inspection law, except as hereafter indicated.

The question is simply, could he, (the Secretary of agriculture) prohibit the making of a compound, which was sound, healthful, wholesome and free from dyes, chemicals, preservatives or ingredients which render such unfit for human food by a mere regulation? We are constrained to say that he cannot."

34 The converse of this proposition is necessarily this:

That if such product in the opinion of the Secretary be unsound, unhealthful, unwholesome and unfit for human food, it is within the power conferred upon him by law to prohibit, by regulation, such product from being sent interstate commerce.

Assuming that all the foregoing statements be true, what is the present attitude of the case now before the court?

After the cause came back to this court, the defendant, Houston (who had not prior thereto been served with process), and who had not entered his formal or voluntary appearance), was duly served with process.

Thereafter on the 21st, of June, 1915, Houston with his co-defendant filed answers to the bill. Then for the first time the allegations of the bill were "controverted." The cause was then brought to a hearing on the bill, answers and proof. The answers of the defendants, while separate, are practically one and the same. Oral arguments by counsel were made and briefs by counsel were submitted.

The answer of the defendant, Houston, seems to be full and complete and puts in issue nearly all of the material allegations of the bill. It will be only necessary to consider what seem to be the most important issues to be determined by the bill and answer.

The answer to the fifth paragraph of the bill is as follows:

"Fifth. The defendant for answer to the fifth paragraph of the bill, admits that a portion of the sausages manufactured by plaintiff are compounds and mixtures composed and manufactured in part from meat of hams, pork, spices  
35 and cereals, if the sausage is of the type known as "fresh pork sausage", and from beef, ham, pork, cereals, spices and other ingredients, if under the style known as "Bologna" or "Frankfurt" sausage; that the amount of cereal used in said compounds and mixtures composing said sausage is as much as from 1 to 10 per cent. of cereals, and that varying amounts of water are also used. And defendant alleges that the amount of water so used by plaintiff often equals 20 to 40 per cent of the finished product.

"And the defendant further answering said paragraph denies that the cereal so used by plaintiff is wholesome, denies that the amount of water used depends upon the meat used, or the amount necessary for the compounding or mixture of the various ingredients; denies that said cereal is composed of ground grain; and denies that the sausages manufactured by plaintiff as alleged therein are sound healthful or wholesome, and denies that said sausages contain no ingredients which render the sausages unsound, unhealthful, unwholesome, or unfit for human food.

"And defendant further answering said paragraph states that cereal is a substance which is inferior to the other in-

gredients composing the sausages manufactured by plaintiff."

Answer the 11th. paragraph of the bill, the answer in part contains the following:

"Defendant further denies that the amount of cereal and water so used in the manufacture of said sausage did not in any way impair the food value of the product or its healthful or wholesomeness as a food."

The following denial is made to the 12th. paragraph of the bill:

36     "Defendant further denies that the said meat food products mentioned in said paragraph are sound, healthful, wholesome or fit for human food."

Answering the 14th. and last paragraph of the bill, the defendant Houston, says:

"Defendant further answering states that the manufacture and sale of a product as sausage, which product contains added cereal and water in quantities as described in plaintiff's bill, or in any quantities in excess of the amount designated in said regulation, effective April 1, 1913 is false and deceptive; that the ordinary consumer of sausage manufactured by this plaintiff has no knowledge or information that sausage contains cereal and added water, that such information is not conveyed to persons who purchase plaintiff's sausage at retail by any method of marking or branding now or heretofore in use by plaintiff, and that it is impracticable and impossible in the ordinary course of manufacture and distribution of sausage to mark or brand the same so that the purchaser at retail or the consumer will be informed as to the amount of cereal and water added thereto.

Defendant further answering states that the addition of cereal and water to sausage has for many years been condemned and disapproved by many authoritative writers and various well known organizations familiar with and concerned in the manufacture and sale of sausage in this country and other countries; that such views and opinions of such writers and organizations have been widely published and discussed, and that this plaintiff knew, or in the reasonable and lawful conduct of its business ought to have known of such views and opinions, and that such use of cereal and water in the manufacture of sausage constitutes a fraud and decep-

tion upon the purchaser and consumer; and the plaintiff as a manufacturer of sausage was and is in duty bound to conform its business to the requirements and provisions of said Act of Congress and of said regulations of the Secretary of Agriculture, and that because of these facts no surprise, hardship, or injustice has been or will be sustained by or done to this plaintiff by the enforcement of this regulation.

"Defendant further answering states that since the filing of this suit and previous to the service of the subpoena on him in said cause the regulations set forth in paragraph 9 of the bill had been superseded by regulation governing the meat inspection of the United States Department of Agriculture, contained in B. A. I. Order 211, which were promulgated on July 15, 1914, by the Secretary of Agriculture, pursuant to the authority conferred upon him by the said Meat Inspection Act, and effective on and after November 1, 1914, and that a copy of said regulations will be produced at the hearing of this cause."

The evidence shows that the regulations effective April 1st., 1913, were annulled and superseded by other regulations effective November 1st., 1914. The latter were in force at the time the defendant Houston was served with process and at the time he filed his answer.

The regulations made effective April 1, 1913, were preceded by the following:

"Washington, D. C., Feb. 28, 1913.

"For the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive name, under the authority conferred on the Secretary of Agriculture by the provisions of the Act of Congress, approved June 30, 1906 (34 Stat. 674) Regulation 18 is hereby amended by the addition of Sections 15 and 16, to read as hereinafter set out.

JAMES WILSON,  
Secretary of [Agriculture]."

38 Counsel for complainant in his brief says:

"The regulation itself shows that it was not based on unwholesomeness but on the question of name," and then refers to the preamble above referred to as proof of that fact.

It appears from the evidence in the case that regulations (including the preamble) effective April, 1913, are no longer



in force, but were superseded by regulations effective November 1, 1914. These latter regulations were adopted and in force when Houston was served with process and at the time the answer was filed. The preamble to the regulations of 1913 is entirely omitted from the regulations of 1914, now in force. This omission, in view of the complainant's contention, seems significant. It is true that certain paragraphs of the regulations of 1913 are retained in the regulations of 1914. They are as follows:

"Section 16. Paragraph 1. Sausage shall not contain cereal in excess of two per cent. When cereal is added its presence shall be stated on the label or on the product."

"Paragraph 2. Water or ice shall not be added to sausage, except for the purpose of facilitating grinding, chopping or mixing, in which case the added water or ice shall not exceed three per cent., except as provided in the following paragraph."

"Paragraph 3. Sausage of the class which are smoked or cooked, such as Frankfurt style, or Vienna style, and Bologna style, may contain added water in excess of three per cent., but not in excess of an amount sufficient to make the product palatable. When water (in excess of three  
39 per cent.) and cereal are added to this class of sausages the statement 'Sausage, water and cereal' shall appear on the product, but when no cereal is added the addition of water need not be stated."

If the Secretary had said in so many words that sausage containing more than two per cent. of cereal and three per cent. of water was unwholesome and not fit for food, and for that reason could not be shipped in interstate commerce, would there be any doubt that his action was well within the power conferred upon him by congress? Not having in explicit terms so declared, what is the fair and reasonable deduction to be made from the regulations and all attendant facts? Why did he limit the amount of cereal and water to be used in the sausage? It cannot be fairly said, I think, that he had in mind only a "false or deceptive name." If this were true there would have been no need of omitting the "preamble" to the regulations of 1913.

The evidence in this case shows very clearly that the product called "Sausage" which contains more than two per cent. of cereal and more than three per cent. of water is a much inferior and a much cheaper product. This is sought to be excused or explained on the grounds, first, that without

the addition of cereal in excess of two per cent. and water in excess of three per cent. the complainant and those engaged in like business, to-wit: Armour, Swift and others, would not be able to compete with those engaged alone in intrastate business.

Second. That it is really a philanthropic product in that the poor—and the laboring man and the laboring woman could obtain such food cheaper, and thereby be able to hold body and soul together. I am free to confess that  
 40 such contentions have very little weight with me. Centuries ago our Master said "What man is there of you, whom, if his son ask him for bread will he give him a stone? Or if he ask for a fish will he give him a serpent"? Here in this case one asks for meat and he is given a large quantity of meal and water.

This may not have much, if anything, to do with the ultimate question to be decided in the case; but, for some reason or other witnesses were questioned by counsel in reference to these matters and their testimony is in the record.

It is insisted that the Court of Appeals settled every possible controversy that has arisen or can arise in this case. If that were true it would be the plain duty of the court to accept such settlement and enter a judgment in accordance therewith. As I understand the decision of the Court of Appeals it decided one question, and that question is: "Could he (the Secretary) prohibit the making of a compound which was sound, healthful, wholesome and free from dyes, chemicals, preservatives or ingredients which render such product unfit for human food, by a mere regulation"? The Court of Appeals said that he could not. If the product is not healthful and wholesome, who is to be the judge? Is it the Court or the Secretary? If the discretion has been lodged in the Secretary to determine such questions, and he has exercised such discretion, the court has no power to compel him to change his judgment. Taking into consideration the regulations made in 1914, together with all the facts and circumstances in evidence, I am satisfied that the Secretary, in the exercise of the discretion given him by law, has  
 41 determined not only that the product mentioned was being sold under a false and deceptive name, but that it was not a healthful or a wholesome food.

However this may be the question as to whether the product containing more than two per cent of cereal and more than three per cent of water is in fact a wholesome food product must be determined under the bill and answer by the court from all of the evidence in the case.

Upon this question the issues between the complainant and defendant are sharply drawn. It is a simple question of fact. The complainant affirms and the defendant denies. It was practically conceded upon the hearing that sausage could be and was made without the use of cereal in many instances, especially in shipments to points in the State of Pennsylvania where by the laws of that State cereal was prohibited from use in a sausage product.

The evidence in this case showed or tended to show that sausage made without cereal and water had superior keeping qualities to sausages made with cereal and water. The use of cereal reduces the price of the product, and disguises the addition of water. The evidence in this case satisfies the court that the addition of water on account of cereal accelerates fermentation, and consequently tends to make the product unwholesome. It is insisted, however, that the sausage reaches the stomach of the consumer within twelve hours after it is made, and before it has time to ferment, sour or decompose. That is a race in which the chances seem to be against the consumer.

I am asked to find that the addition of from five to ten per cent. of cereal and from ten to twenty per cent. of water does not render "sausage" unwholesome or unfit for food. Conceding that the meat, cereal and water used in making a product called sausage are in themselves sound and wholesome constituents, yet when they are put [to] together  
42 in quantities ranging from seventy to eighty per cent of meat, five to ten per cent. of cereal, and ten to twenty per cent. of water, is the product wholesome and fit for human food? I cannot bring myself to believe that such a product, under all of the evidence in the case, is a whole-some food.

I must therefore find the issue, made by the pleadings in that regard, in favor of the defendants.

To sum up the conclusions reached by the court they are as follows:

1st. The regulations promulgated by the Secretary in 1914 were within his province and power to make, in determining the question as to whether the product of more than two per cent of cereal and three per cent. of water rendered such product unwholesome and unfit for human food.

2nd. The evidence in the case, without regard to the regulations, satisfies the court that upon the issues joined, the finding must be for the defendants.

It is so ordered.

The bill is dismissed.

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44 (Bill of Exceptions. Filed in the District Court on March 31, 1916.)

Be It Remembered, that upon the trial of this cause, during the September Term, 1915, of the District Court of the United States, for the Eastern Division of the Eastern Judicial District of Missouri, upon the 28th, 29th and 31st days of January, 1916, before the Honorable David P. Dyer, Judge of said District Court, the following proceedings were had.

Appearances:

Judge Franklin Ferriss, of Ferriss, Zumbalen and Ferriss, and Mr. A. B. Stratton, on behalf of the Complainant.

Mr. W. H. Woodward, on behalf of the Defendants.

Saint Louis, January 28, 1916.

45 Note: In accordance with Equity Rule No. 50, the Court appointed Mildred J. Cook to act as stenographer in reporting the evidence and proceedings which shall be had in this cause. The transcript of such stenographic report is as follows:

Counsel for the complainant and the defendants made their opening statements to the Court, and read the pleadings in the case.

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(Testimony for Complainant.)

Thereupon the complainant, upon its behalf, introduced the following evidence:

46 GUSTAV BISCHOFF, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the complainant, as follows:

Direct Examination

By Judge Ferriss:

Q. State your full name, please. A. Gustav Bischoff.

Q. What is your business?

A. I am engaged in the packing business, meat packing.

Q. What is the name of your concern?

A. St. Louis Independent Packing Company.

Q. What is your position in the business?

A. I am President of that Company.

Q. What is the general nature of the business of that packing Company?

A. The curing of meats, making sausages, lard, etc., that goes with the packing business.

Q. Do you buy cattle, hogs and sheep?

A. We buy cattle, hogs and sheep.

Q. And slaughter them? A. And slaughter them.

Q. You make up various products?

A. We do; that are usually made.

Q. You do what is known as a general packing house business? A. Yes, sir.

Q. Where do you sell your products?

A. We sell them—

Q. I do not mean specifically, but generally.

A. Well, generally, of course, right in our city and all over the United States.

Q. Do you ship in interstate commerce? A. We do.

47 Q. How long have you been in the meat packing business?

A. Do you mean in the meat business altogether?

Q. Yes. How long?

A. In business personally, or since I am engaged in the business?

Q. How long have you personally been engaged in the meat packing business?

A. I started at about 1864 was my first step into a slaughter house in this work; or, 1863, really.

Q. And you have been in the business in one relation or another since that time? A. Since that time.

Q. How long have you been manufacturing sausages and shipping them in interstate commerce?

A. About twenty-four or twenty-five years.

Q. Mr. Bischoff, give the Court in a general way the magnitude of your business generally, and in sausages, at the time we brought this suit and now; in pounds or in dollars, I do not care which.

A. Well, it is pretty hard for me to remember the figures.

Q. I do not expect you to give it closely, but in round numbers. Do you do a large or a small business?

A. We do a large business. We do a business anywhere, I will say, from ten million to fifteen million a year.

Q. You are speaking now of money? A. Money.

Q. About what proportion of your whole business is your sausage business?

A. Our sausage business, I will give you that in pounds, because I haven't got—as near as I remember, we make  
48 about five to six million pounds a year.

Q. Will you state to the Court generally what different varieties of sausages you manufacture?

A. We manufacture a fresh meat sausage, which consists of bologna, frankfurters, wieners, little kochwurst, what is called mett sausage, and such as that. Then pork sausage—

Q. About how many varieties altogether?

A. Oh, there are possibly about fifteen varieties there.

Q. How are they put up, the bulk of them; are they stuffed in cases?

A. They are put up in retainers, in casings, mostly.

Q. Which are called links?

A. Links, sheep casings, hog casings, bull casings, in cloth.

Q. What proportion of your total manufacture of sausages is put up in these casings? A. The question again?

Q. What proportion of your entire sausage output is put up in casings? A. In casings?

Q. Yes.

A. You might say that all of it is in casings of some kind, that is, including cloth, sacks.

Q. Practically the entire business is done in that way?

A. There would be very little that would not be done that way. There is mighty little loose sausage sold.

Q. I want to get you to state how these sausages are treated after they are stuffed in the casings.

A. After they are stuffed?

Q. Yes.

A. A number of them are smoked and partly cooked, so as to say curing them, and finishing them ready to be shipped out, or sold at home.

49 Q. Do you make a sausage that is intended to keep a long time, called summer sausage?

A. We do make some.

Q. What is the main part of your business in sausages?

A. Making a sausage that is used from day to day; making a new supply every day as the trade demands. That is the bulk of it.

Q. Have you been in the practice of using cereal in the manufacture of sausages? A. We have.

Q. State generally, for the information of the Court, what are the ordinary ingredients of sausage, what meats do you use?

A. Well, the ordinary ingredients are beef and pork, outside of making a so-called liver sausage or pudding. Of course, we use livers there.

Q. Do you use spices?

A. We use spices, salt, sugar.

Q. Up to the time of this regulation of 1913, limiting the use of cereal to two per cent, what was your practice in the use of cereal, to what extent did you use it; I mean, what percentage did you use?

A. We used anywhere, I will say, from two or three to ten per cent.

Q. Of cereal? A. Of cereal.

Q. What was that cereal composed of?

A. In our case it was corn flour.

Q. Corn flour? A. Yes, sir.

Q. Where did you get that corn flour?

A. We bought it here of the Southern Mills.

Q. Do you have any inspection made of that flour?

A. We do. We have it tested by a chemist, occasionally.

50 Q. Is there any inspection of it by the Government after it is in your factory?

A. As much as I know, the Government takes a sample and analyzes it from time to time.

Q. State whether or not the corn flour which you used in the manufacture of sausage was a sound, wholesome grain?

A. As much as I know, to my knowledge, it was sound and perfect, good, wholesome corn flour. The best we could get.

Q. Do you know how long cereal had been used in the manufacture of sausages, outside of your own work?

A. I don't know.

Q. How long had you used it?

A. I have used it for about twenty-four years, or twenty-five.

Q. Have there ever been any complaints with regard to its use? A. Never that I know of.

Q. Do you know whether it is used generally by packers?

A. It used to be.

Q. I am speaking now of the time before this regulation.

A. It was then used generally, yes, sir.

Q. Do you know whether it is used outside of this country, in Germany, or other places?

A. Germany used it very much.

Q. Has it or has it not been in general use in the packing industry?

A. It has been ever since I know the business.

Q. What is the effect of the cereal in the sausage?

A. Well, the effect in a good many cases is this, that it acts as a binder.

51 Q. It acts as a binder?

A. It acts as a binder, and—

Q. Does it facilitate the mixing of the sausage?

A. It does.

Q. Will you not state to the Court what the consistency of sausage is when it is ready for stuffing, what does it look like?

A. Well, it is ground up meat mixed with spices and whatever cereal, (if you add any) whatever cereal may be added.

Q. Is that a heavy, solid mixture, or is it soft and pliable?

A. It is pliable.

Q. Is it required to be so in order to facilitate stuffing?

A. Well, you couldn't stuff it unless it was pliable.

Q. Does the use of cereal cheapen the product?

A. It does, some.

Q. It makes a cheaper article of food?

A. It lowers the price some, not a great deal.

Q. In your experience, does the trade get the benefit of that lower price?

A. It always has. We always, in most cases, try to manufacture goods at just as low a price as we can and sell accordingly. There is a lot of competition that we have got to meet.

Q. What has been your practice with regard to marking or labeling this product when you shipped it, under the regulations?

A. Since these regulations are out we mark it whether it has cereal added or not.

Q. Do you put the word "cereal" on the label?

52 A. Yes, sir.

Q. Do you know whether the word "cereal" is stamped on the link of sausage itself?

A. If there is cereal in it, it is, except in the case of wieners, on, probably every third or fourth one may be stamped.

Q. But the larger varieties? A. Are all stamped.

Q. Each individual link is stamped? A. Yes, sir.

Q. And with the small ones every fourth or fifth one is stamped?

A. The small ones every fourth or fifth one, or somewhere thereabout.

Q. Mr. Bischoff, up to the time this regulation was adopted in 1913, limiting cereal to two per cent, was there any question ever raised by the inspectors as to the amount of cereal you used? A. Up to that time?

Q. Yes, sir. A. Up to this new regulation?

Q. Yes.

A. Never to my knowledge. The inspector paid no attention to that.



Q. Your product was passed by the Department?

A. Yes, sir.

Q. Explain to the Court in a general way what the system of inspection is as it is practiced in your factory.

A. Do you want to start it from the livestock on—I think I have explained that a while ago—or just of this Department?

Q. Explain that a little more in detail. What examination is made of the livestock?

A. The livestock is inspected when it arrives on the hoof, but it goes through final inspection at the time of killing.  
53

Q. After the animal is killed is the carcass inspected by the Government?

A. It is inspected, also the entrails.

Q. What is done with it after the inspection?

A. It is marked "inspected and passed."

Q. If it is not passed how is it marked?

A. Retained, and then it is looked over again and if it is condemned it is so marked "condemned."

Q. It is marked "condemned?" A. Yes, sir.

Q. Then what becomes of that which is condemned?

A. It goes to the rendering department.

Q. And is not sold for food?

A. Some that is fit for food purposes, as far as the lard is concerned of the hog, and so on, goes into the lard tank. The other all goes into—

Q. Mr. Bischoff, from the time the animal is first inspected until the time the product is shipped, is there any process, or what processes are there in your factory that are not inspected by the Government?

A. There are not any that I know of. It is all under inspection.

Q. Does the Government watch the operations from the beginning to the end? A. They do.

Q. Do you sell any sausages here in the city? A. We do.

Q. This act of Congress, the Meat Inspection Act, applies only to shipments in interstate commerce: How about the local butchers, do they make up any sausages?

A. Quite a number of them.

Q. Is there any law, or any practice, to limit the amount of cereal they use? A. None whatever.  
54

Q. In selling in town are you in competition with them? A. We are.

The Court: Q. Do you make any difference in the manufacture of sausage for trade in interstate commerce and trade in intrastate commerce?

A. We do, Judge, where it is required. Pennsylvania, for instance, will not permit cereal. For the state of Pennsylvania we make it without cereal.

Q. That is, all you send there? A. Yes, sir.

Q. I am talking about the sausage you manufacture for home consumption, that is, intrastate: It has nothing to do with the interstate—

Judge Ferriss: I see what your Honor is getting at.

The Court: Proceed.

Judge Ferriss: Q. Is all the sausage that is sent out of your factory inspected by the Government? A. It is.

Q. Does that apply to the sausage that is sold locally?

A. It does.

Q. Why can you not manufacture sausage for local consumption free from this regulation, as distinguished from that which you ship in interstate commerce?

A. We would have to do it in an uninspected establishment disconnected from the present establishment.

Q. You mean to say that if you undertook to manufacture for local consumption without inspection you would have to have a separate organization? A. Absolutely.

55 Q. Why?

A. Because the Government would not tolerate any sausage made in a room that is connected with a general plant to allow you to make an uninspected sausage to sell in the city.

Q. Would not allow it in the same premises?

A. Would not allow it in the same premises. Of course, we could build on the same ground a building separate for itself.

Q. So that practically you are debarred from making any sausage except under Government inspection?

A. Yes, in an inspected building, in a Government inspected packing plant.

Q. I am talking about your own business now.

A. You mean at our plant such is the case?

Q. You have no separate plant?

A. We have no separate plant.

Q. What extent is that local business? Give a rough statement.

A. Oh, I suppose 85 per cent of our output is sold locally; say 75 per cent, to be more sure.

Q. 75 per cent? A. Yes, sir.

Q. Is sold here in St. Louis?

A. Is sold here in St. Louis.

Q. And that is sold in competition with local butchers?

A. It is.

Q. Mr. Bischoff, another question: Can you ship out any product from your factory which has not been marked "Inspected and passed?" A. No, sir.

Q. Mr. Bischoff, you say you have been in the sausage business about twenty-five years?

A. About that length of time.

56 Q. I will get you to state to the Court an estimate of the value to you of the privilege of using cereal in excess of two per cent in your business. I do not mean the yearly value; I mean as a whole: What is the privilege worth?

A. Well, it is hard to really put a price on it, but I would say at least \$10,000; that is, for the continuous right of using cereal.

Q. You mean by that, that the enforcement of this regulation is a damage to you of \$10,000? A. That, or more.

The Court: Q. Per year, each year?

A. Not per year.

Q. Altogether? A. While we continue doing this business.

Judge Ferriss: Q. I want to develop one matter a little further that probably will be gone into more or less: You say you make your sausages from beef and pork, mainly?

A. Mainly.

Q. Is there a difference in the kinds of beef that you use with regard to its binding qualities?

A. There is a great deal of difference.

Q. Will you not explain that a little?

A. Well, in meat products we consider the cheap meat is cheap parts, are used along in commoner sausages. Those are meats of a very brittle short nature. In other words, they won't bind without probably adding some bull beef or other beef of that nature that will make a binder, or adding cereal. Cereal will help to bind it.

Q. Do different kinds of beef have different binding qualities?

A. Well, they do. The best binder is a bull.

57 Q. The bull beef is the best binder?

A. The bull beef is the best binder.

Q. Is there a difference in the moisture content of different kinds of beef?

A. That I couldn't answer, because you would really have to test it up. The moisture generally contained in—

Q. What I want to get at, Mr. Bischoff, is whether some kinds of beef, or meat, require the use of cereal more than other kinds? A. They do.

Q. That depends on its binding qualities?

A. The poorer the class of beef, or even beef that is rather fat, needs a binder, as fat is a shortener.

Q. How does the use of cereal affect the appearance of the sausage, or its cooking qualities, or its taste?

A. Why, it helps; that is, a great many people would rather have cereal go into the sausage; they like the flavor of it and like it better than they do without, but the majority of the public I don't believe detect it, whether it is in or not.

Q. Take a frankfurter sausage: Is a frankfurter sausage generally regarded more toothsome, juicy, or is it dry?

A. It is juicy, is the way they want it. It is more toothsome that way, more palatable.

Q. I do not know whether the Court understands it, I do not quite understand it myself; What do you mean by binding? Suppose you have not a good binder: What is the difference between a sausage that is well bound and one that is not well bound?

58 A. If you did not have a good binder and your meat was dry and brittle your sausage would be something like it was filled with sawdust. It would not hold together, in other words. That is why I use that expression.

Q. It would crumble? A. It would crumble.

Q. You say cereal overcomes that tendency?

A. Cereal will help that along and partly overcome it.

Q. Does the cereal materially affect the taste of the sausage?

A. Not if it is not used, I will say, over six or eight per cent you will not notice the difference, hardly.

Q. Take your own experience, Mr. Bischoff, in your use of cereal as you have been in the habit of using it: Is the product which you produce with the use of corn flour a wholesome product fit for food? A. Absolutely so.

Q. Have you ever had any complaints to the contrary?

A. No, sir.

Q. Have you ever had any complaints as to its keeping qualities? A. No, sir.

Q. It keeps just as well as the other?

A. It keeps just as well, for all we know.

Q. I show you an imprint of a stamp or stencil which is in an oblong circular about an inch long and a half inch wide, with the letters "U. S. Insp. P. S. D." in the upper part, and 166A in the center, with the words "Cereal added" at the bottom: I will ask you what that is?

A. Those are stamps that we use on our different sausage with this coloring matter.

59 Q. That stencil is put on all of the large sausage?

A. Yes, sir.

Q. And on every four or five of the smaller, you say?

A. Yes, of the smaller.

Q. I hand you a paper carton and ask you what it is?

A. This is a carton we use and usually pack ten pounds of sausage in.

Q. That is the carton you ship your sausage in?

A. Yes; there is marks on it—

Q. I will call attention to the lettering on the one end, "Sausage and cereal" in large type; "Establishment No. 166 A" in smaller type; "U. S. Inspected and Passed by Department of Agriculture," and below that, in still larger type, "St. Louis Independent Packing Company, Saint Louis, Mo.;" What I have just read applies to each end.

On the sides and top are the words "Saint Louis Independent Packing Company;" How large is this carton?

A. I don't know the measurement.

Q. About how large, so I can get it in the record?

The Court: 12 x 6.

Judge Ferriss: 12 x 6.

The Court: That is about as near as you can determine it.

Judge Ferriss: It is judicially determined to be 12 x 6.

Q. I hand you a little printed slip which has the words  
"Sausage & Cereal Establishment 166 A U. S. In-  
60 spected and Passed by the Department of Agriculture;"  
This slip is about 1½ inches wide and 3 inches long?

A. Used as a sticker on boxes.

Q. That is used as a label? A. Yes, sir.

Judge Ferriss: Would it be agreeable to the Government to have an understanding that these cartons may be used if we have occasion to use them? We cannot put them into the record very well—

The Court: File it as an exhibit and if you have to use it hereafter you can stipulate then as to the physical exhibits—

Judge Ferriss: That is a very good suggestion, and I will ask to have this box marked as "Complainant's Exhibit A", and the label as "Complainant's Exhibit B."

(The box and label were accordingly marked, and will be found attached at the end of this volume.)

The Court: Q. When did you first begin using cereal in the making of sausage?

A. At the very beginning of the time that I went into the general packing business, which is about twenty-five years ago.

Q. What percentage did you then use?

A. Why, we used a larger per cent at that time. We possibly used anywhere from five up to twelve per cent at that time.

Q. Has it been reduced any or increased since that time?

A. With us it has been reduced, I will say.

Judge Ferriss: You use varying proportions—

A. We do.

Q. —depending on the product? Do you make any without any cereal? A. We do, some.

61 Cross-Examination

By Mr. Woodward:

Q. You have stated in your direct examination that you have made summer sausage at your plant?

A. We do.

Q. You do not put any cereal in that sausage, do you, Mr. Bischoff? A. No, sir.

Q. Why? A. For no particular reason.

Q. Is it not a fact that the addition of cereal to the sausage which you have denominated as "summer sausage" tends to make the sausage sour very quickly?

A. I wish to state that in our case we could use it just as freely as we could in bologna, or any other, because we make it only from time to time, say every week; just as the trade demands it. We make no regular summer sausage, that is what I mean; a winter made sausage for the summer is what they term a "summer sausage".

Q. From your experience in this business, Mr. Bischoff, how long from the time when your sausage is made does it take the sausage to reach the consumer? A. With us?

Q. Yes, sir.

A. Possibly from one to three days; that is, for the bulk of it.

Q. You have stated that most of your sausage is that which you call link sausage?

A. I did not state that.

Q. Pardon me. I understood you to say that practically all the sausage which you put up was either put up in casings or canvas covers, or something of that sort; that you sold very little sausage in bulk; Is that correct?

A. That is correct.

Q. And further, that most of your sausage was sold in the city of St. Louis? A. Yes, sir.

Q. Being about 75 per cent of it?

A. That is right.

Q. And that you had to compete with the butchers?

A. With local competition.

Q. Most of the sausage made by the local butchers is not sausage put up in casings, or canvas covers, is it, Mr. Bischoff? A. It is put up in casings or canvas covers.

Q. What is the price of the cereal that goes into your sausage, Mr. Bischoff?

A. I don't know whether I can quote correctly; somewhere around two cents a pound.

Q. About two cents a pound?

A. Somewhere around that.

Q. And the meat that goes to make up that product is how much?

A. Oh, anywhere from six to as high as fifteen cents in some few cases.

Q. In a product which contains ten per cent of cereal how much added water would there be, Mr. Bischoff, approximately? A. Well, there will be just enough added to work the sausage, the dough.

Q. That is approximately twice the amount of the cereal in there, is it not?

A. It could be if the meat itself was very short, very dry, it may take that much to work it.

Q. What I am getting at is, in ordinary cases and under ordinary conditions when you add ten per cent of cereal to a sausage you would expect to have to add at least twenty per cent of water, would you not, in order to make up a workable product?

63 A. Not necessarily so in every case, no. Some meat is drier and some contains more moisture; it is short and wet.

Q. But that would be true in the ordinary case, would it not?

A. It might be true in a good many cases, yes, sir.

The Court: Q. Taking the product as you make it and putting in ten per cent cereal, what would be a fair amount of water that you would have to put into the sausage?

A. I will say that you can add fifteen per cent and you may add twenty per cent. You may add even more, if you like.

Mr. Woodward: Q. In some cases running as high as forty per cent, does it not, Mr. Bischoff?

A. I don't know of any.

Q. In your product which contains ten per cent cereal, and the added water which you say is put in to make it workable, what difference in price do you make between that sausage and a sausage which contains no cereal and no added water?

A. Well, a sausage that you could and would work—now, we don't work it so, but if you did use ten per cent you would cheapen that sausage probably as much as fifty to seventy-five cents a hundred by the use of that cereal.

Q. I am not asking what could be done, but what you actually do, Mr. Bischoff?

A. We use anywhere from one to ten, and not in all sausage. Now, that is as near as I can give you.

Q. In that particular kind of sausage that contains the ten per cent of cereal what difference in price do you make compared with the sausage which contains none?

64 A. We would sell that a half dollar a hundred cheaper.

Q. You stated, I believe, that you were familiar with sausage making in Germany? A. I haven't said that.

Q. You have no personal knowledge of how—

A. No, I haven't stated that. Your question is, you said I stated I was familiar with sausage making in Germany.

Q. I thought I understood you to say what sausage—

The Court: Q. Are you familiar with it? That is the question.

Mr. Woodward: Q. As a matter of fact, do you not know that the use of cereal in sausage is universally condemned by the German sausage makers?

A. I don't know that.

The Court: Q. As I understand you, the more cereal you add to the product the more water you add on account of the cereal, is that correct?

A. You have to add it, Judge, to get the mixture.

Q. The more cereal you have the more water you need?

A. The more cereal you have the more water you need for the process.

Q. And by adding the cereal and the water you cheapen the product, is that it? A. Some.

Mr. Woodward: Q. In stating it was worth \$10,000 to your business for the right to use the cereal in the manufacture of sausage, Mr. Bischoff, did you mean \$10,000 a year, or \$10,000 for the continued right forever?

A. For the continued right of using it for all times.



Q. You have no personal knowledge of whether cereal  
65 is used in the manufacture of sausage in Germany?

A. I know it is used there, as far as that is concerned, but I have not made any sausage over there; I have not been engaged in that business over there. That is what I wanted you to know.

Q. The cereal used in sausage in Germany is limited, in most localities, to two per cent, is it not?

A. I am not familiar with that fact.

Q. Would you say that it is necessary to use cereal in the manufacture of sausage as a binder?

A. In some cases.

Q. In what cases?

A. Anywhere you have very short meat, as we call it; something that won't bind.

Q. Would it not be possible to make a sausage by adding water in those cases, without the cereal?

A. No, sir, it would help to separate it in that case.

The Court: Q. Water would not be a binder?

A. It would not be a binder.

Mr. Woodward: Q. Bull meat would take the place of the cereal, would it not? A. It would.

Q. What is the minimum amount of cereal which you consider necessary as a binder in that class of meat?

A. Well, it will probably run anywhere from five up to ten per cent.

Q. That much you say is necessary? A. We feel it is.

#### Redirect Examination

By Judge Ferriss:

Q. Mr. Woodward asked you about the cost of cereal and the cost of meat: In making up the cost of the finished product what elements do you consider?

66 A. I don't quite understand the question.

Q. In making up the cost of the finished product what elements go into the cost of production besides raw material, if any? A. The labor, spices, and so forth.

Q. What is generally spoken of as "overhead charges?"

A. Overhead charges. They are all figured in.

Q. They are all figured in?

A. They have to be figured in.

Q. So that the cheapening of the ingredients of the raw material does not show a corresponding diminution in the total cost of production?

The Court (To the witness): What counsel means is that though you put cereal in, it does not reduce the overhead charges?

A. It certainly don't.

Judge Ferriss: Q. The labor is just the same, the investment and everything else?

A. Everything else is just the same.

Q. Do you know anything about the amount of moisture that is in lean meat?

A. Well, I do some. Some years ago we made tests.

Q. How high does it run?

A. At that time we used hydraulic presses for that purpose, I think. We found about a total moisture of 85 per cent, about, in absolutely lean meat.

Q. Some of it is lower than that?

A. Some is lower. If there is any fat matter—

Q. But there is a large amount of moisture in meat?

A. Yes, sir.

67 Q. You stated that when you used cereal you added, say ten per cent of cereal, and you added twenty per cent of water: If there is from seventy-five to eighty-five per cent of moisture in meat itself, then the total moisture in the combined product is less than it would be if it were all meat: Is that correct? A. Yes, sir.

Q. Does the finished product lose any moisture before it is put on the market?

A. It usually loses—in some cases loses all that you add, and in other cases probably there might be, again, anywhere from one to ten per cent.

Q. What process do you put the sausages through after they are stuffed, before they are ready for the market?

A. We smoke them with a hot smoke and cook them partly.

Q. Does that dry out the moisture?

A. That smoking process takes the moisture out and the cooking sometimes takes a little—

Q. So, as a general proposition, the finished product has less moisture than the natural meat has when it is fresh?

A. It may have the same. It may hold its own.

#### Recross Examination

By Mr. Woodward:

Q. Is the labor cost to which you have just referred, in the manufacture of sausage any greater when you put cereal and water with that sausage than in the case of a sausage made without cereal and water?

A. The cost is just the same in either case.

Q. The labor cost is just the same?

A. The labor cost is just the same.

68 Q. You manufacture sausages and sell them in the state of Pennsylvania? A. We do.

Q. And in none of those sausages do you put cereal or added water? A. We add water.

Q. You add no cereal, however? A. No cereal.

#### Redirect Examination

By Judge Ferriss:

Q. What material do you use for those sausages?

A. We use the ordinary run of meats that come along, mix them, all kinds, anywhere from the beef heart on up to a bull.

#### Recross Examination

By Mr. Woodward:

Q. Mr. Bischoff, if cereal were to cost you the same price as the meat which you put into your sausage would you still consider it necessary to use it?

A. I would in a good many cases. It would help the good taste of the sausage.

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69 CHARLES BOEHM, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the complainant, as follows:

#### Direct Examination

By Judge Ferriss:

Q. State your name, please. A. Charles Boehm.

Q. What is your business? A. Butcher.

Q. What is your relation, if any, to the Independent Packing Company? A. No relationship at all. You mean—

Q. What is your position with the Packing Company?

A. Sausage maker.

Q. Sausage maker? A. Yes, sir.

Q. Are you the foreman in that Department? A. Yes, sir.

Q. What are your duties as foreman?

A. Why, my duty is to look after everything, to see that everything is all right.

Q. Speak a little bit louder, please.

A. My duty is to look after everything, that everything is going all right.

Q. Do you [superintendent] the mixing? A. Yes, sir.

Q. Do you determine how much cereal is to be used in the mixture? A. Yes, sir.

Q. On what do you determine that, what determines it, what influences you in determining the amount of cereal to be used? A. About five per cent.

Q. You use about five per cent? A. About five.

Q. Does that vary with different meats, do you use different amounts according to the different meat?

A. I do, according to the meat.

70 Q. Does some meat require more cereal than others?

A. Yes, sir.

Q. What makes that difference?

A. Why, the difference in meat is bull meat, and you find cheek meat, and hearts.

Q. Bull meat does not require as much cereal as the other kinds? A. Not quite.

Q. That is because it has better binding qualities: Where do you get your cereal?

A. I really don't know what factory; it is here in St. Louis.

Q. It is bought here in St. Louis? A. Yes, sir.

Q. What kind of cereal do you use? A. Corn flour.

Q. Do you use anything besides corn flour?

A. No, sir.

Q. What is the character of the flour that you use as to whether it is sound or wholesome?

A. Why, yes, it is wholesome.

Q. Do you have it inspected? A. Yes, sir.

Q. Does the Government inspect it?

A. The Government and we do.

Q. You have your own chemist?

A. Yes, our chemist.

Q. And then the Government inspects it? A. Yes, sir.

Q. Does the use of the cereal in sausage make a wholesome product? A. Yes, sir.

Q. How long have you been in the sausage business?

A. About twenty-eight years: twenty-eight to thirty years.

Q. How long has cereal been used in the manufacture of sausage? A. Ever since I know of it.

71 Q. Do you know whether it is used in other packing houses? A. Why, I think it is. I am not sure.

Q. How long have you been with the Independent Packing Company? A. Since 1903.

Q. Did you ever live in Germany? A. Yes, sir.

Q. Do you know whether cereal is used there or not?

A. Quite a bit.

The Court: Q. Is this corn meal that you use coarse corn meal, or is it bolted or sifted corn meal?

A. It is very fine.

Q. It is very fine? A. Yes, sir.

Judge Ferriss: Q. Did you ever make any sausages in Germany? A. I did.

Q. Did you use cereal there? A. Yes, sir.

#### Cross-Examination

By Mr. Woodward:

Q. In what part of Germany did you make sausages?

A. That is in the northern part of Germany.

Q. The amount of cereal which is used there is restricted, is it not? A. How do you mean?

Q. In certain parts of Germany you can not use over two per cent of cereal, can you? A. Not as I know of.

Q. You came with the St. Louis Independent Packing Company in 1903? A. In 1903.

Q. Since you have been there at one time the St. Louis Independent Packing Company discontinued the use of cereal, did it not? A. They did.

72 Q. During the time that they were not using the cereal in the manufacture of their sausages you were enabled to make sausage which had satisfactory binding qualities, were you not?

A. Why, there was one time that we couldn't use it for a time, because we were not satisfied.

Q. You continued to make the same kind of sausage during that time that you are now making, did you not?

A. No, we couldn't.

Q. What kind could you not make?

A. We couldn't get a binder on it.

Q. Could you not use the bull beef for a binder?

A. Why, yes, I could, but still it don't make enough binder for that meat what I am using.

Judge Ferriss: Q. Do you mean to say there are not enough bulls to go around?

A. There may be enough bulls, but I couldn't find enough binder in bull meat.

The Court: Q. What is the difference between bull meat and any other kind of meat?

A. Take cheek meat, cheeks and beef hearts, there is no binder to them.

Q. Bull beef is a little harder to work, is it not?

A. Not if it is worked right.

Mr. Woodward: Q. During that time that you were not using cereal you did make and manufacture all the kinds of sausages you are at present manufacturing?

A. Yes, we did.

73 H. E. WIEDEMANN, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the complainant, as follows:

#### Direct Examination

By Judge Ferriss:

Q. State your name. A. H. E. Wiedemann.

Q. State your business or profession.

A. I am a consulting chemist here in the city.

Q. Have you examined any corn flour for the Independent Packing Company?

A. Yes. I have handled their chemical work for about eight or nine years and they send corn flour to me to be examined as they purchase it.

Q. You have been inspecting their corn flour during that time? A. Yes, sir.

Q. What have you found its character to be as to whether it was sound and wholesome?

A. It has always been sound and in good condition. It is a very finely ground meal and something like wheat flour. It has always proven wholesome.

Q. How long have you been a chemist?

A. I have been a graduate chemist thirteen years.

Q. Are you able to determine by an inspection whether corn meal is healthful and wholesome?

A. I am able to determine whether it is sound and wholesome, yes, sir.

#### Cross-Examination

By Mr. Woodward:

74 Q. Briefly, what kind of test did you use in determining the character of the corn meal?

A. When we get a sample we usually make a complete analysis of it for moisture, protein, carbo-hydrates, fat, crude fibre and ash, and make a physical examination, and look at it under a glass.

Q. Under a microscope, you mean? A. Yes, sir.

Q. You never did examine any of the sausages manufactured by the plaintiff concern after the cereal was added to them, did you? A. No, I did not.

75 EUGENE FINER, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the complainant, as follows:

Direct Examination

By Judge Ferriss:

Q. State your name, please. A. Eugene Finer.

Q. What is your business? A. Milling.

Q. With what concern are you connected?

A. The Engelke & Finer Milling Company.

Q. What business are they in?

A. They manufacture corn products only.

Q. Do you know the St. Louis Independent Packing Company? A. Yes, sir.

Q. Does your concern sell them corn flour? A. Yes, sir.

Q. How long have you been selling them?

A. Off and on for the past three or four years.

Q. Are you able to state what the character of the flour is that they purchase from your concern, as to whether it is sound and wholesome? A. Yes, sir.

Q. What is it? A. It is pure corn product.

Q. Pure corn flour: Have you ever sold them anything else except pure corn flour? A. No, sir.

Q. Is the corn flour that you sell them sound and wholesome flour? A. Very much so.

Cross-Examination

By Mr. Woodward:

Q. Do you make a business of selling flour to packers because of the quality which your flour has of being able to absorb large quantities of water?

76 A. I don't know anything about that. We only sell them because they ask for it. We don't solicit the trade.

Q. I want to get that into the record. It is a very finely bolted flour, is it not?

A. Corn product, yes, sir. You cannot term it "flour" because it is made of corn. We have to term it "corn flour."

The Court: The witness says it is just as fine as flour made from wheat.

Mr. Woodward: Q. As a matter of fact, does not your salesman in selling this product make the claim for your flour that it absorbs more moisture than any other flour upon the market, Mr. Finer? A. No, sir.

At this point recess was had until two o'clock in the afternoon.

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After recess on Friday, January 28, 1916, the following proceedings were had at two o'clock in the afternoon:

Judge Ferriss: I desire to offer in evidence the print of the stencil which the witness Bischoff testified was used in marking the sausages.

The stencil last referred to was accordingly marked "Complainant's Exhibit C," and is attached at the end of this volume.

Judge Ferriss: I desire to recall Mr. Bischoff to ask him a single question that I omitted to ask.

77 GUSTAV BISCHOFF, recalled, testified on behalf of the complainant, as follows:

#### Direct Examination

By Judge Ferriss:

Q. Mr. Bischoff, you testified that the sausages which you manufacture are composed of sound and wholesome ingredients? A. Yes, sir.

Q. I wish to ask you just a single question, whether they contain any dyes, chemicals, preservatives or ingredients that would render them unsound, unwholesome or unfit for human food? A. No, sir.

Judge Ferriss: That is all.

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(Complainant's Exhibits, Excerpts from certain Meat Inspection Acts and Regulations, etc.)

Now I desire to offer in evidence some regulations of the Department:

First: I offer instructions concerning trade labels under the Meat Inspection Law and Regulations revised December 10, 1906. I have an official copy.

I am offering these, but the understanding is that either side may use such parts of them as they desire, in the record or in the argument.

I will read that into the record:

"The word 'Sausage' without a prefix indicating the species of animal is considered to be a mixture of minced or chopped meats, with or without spices. If any species of animal is indicated, as 'Pork Sausage,' the sausage must be wholly made from the meat of that species. If any flour or other cereal is used, the label must so state."



(The foregoing was marked "Complainant's Exhibit D.")

78 Judge Ferriss: I next offer in evidence regulation covering the Meat Inspection Act effective May 1, 1908, as "Complainant's Exhibit E," and will read from page 28, Section 13:

"A meat food product that contains a substance or substances, including water, added for the purpose of adulteration and which lessens its food value shall bear a label stating that such substance or substances have been added."

I next offer in evidence as "Complainant's Exhibit F" Service Announcement of July 15, 1909, and will read from page 57:

"Sausage which contains cereal or benzoate of soda shall be placed in suitable cartons, and each carton shall bear a statement showing the presence of the cereal or preservative in accordance with the regulations before the product is permitted to leave official establishments."

I now offer in evidence as "Complainant's Exhibit G" Service Announcement of August 16, 1909:

"The casings of sausage containing cereal or benzoate of soda, which are of such size and character as to permit such marking, should be marked with the inspection legend by the use of brand and ink furnished by the Bureau. The statement showing the presence of cereal or preservative should also be branded with Bureau ink on such casings in connection with the inspection legend; such brand should first be approved by the Bureau. Sausage so marked is not required to be placed in cartons or similar containers."

I now offer in evidence as "Complainant's Exhibit H" Service Announcement of February 15, 1911, and will read from page 6:

"In the preparation of new labels, stencils, and brands for marking meat food products which contain cereal it is required that the statement 'Cereal added' or 'With cereal added' shall appear in lieu of the statement 'With cereal.'"

79 I next offer in evidence as "Complainant's Exhibit I", Service Announcement of April 15, 1911, and read from the first page:

"Potato flour or beans in powdered form when added to meat food products can not be considered as cereal. Their

presence shall therefore be shown on the label by the statement, 'Potato flour added,' or 'Bean flour added,' as the case may be."

I now offer in evidence Service Announcement of April 15, 1912, as pleaded in the bill and admitted by the answer. It reads as follows:

"Labels for meat and meat food products to which cereal, potato flour, or similar substances are added will in the future be required to have the statements 'cereal added,' 'Potato flour added,' etc., appear thereon in type of such size as will be in good proportion to the name of the product, provided the product does not contain more than five per cent of cereal, potato flour, etc. If this percentage is exceeded, the words 'Cereal,' 'Potato flour,' etc., must appear as a part of the name of the product in the same size and style type and on the same line; for example, 'Sausage and cereal,' 'Sausage and potato flour.'"

The announcement of July 15, 1912, is pleaded and admitted, and reads:

"Referring to instructions in Service Announcements of April 15, 1912, page 26, under the heading 'Labeling of meat and meat food products containing added substances,' attention is called to the fact that this applies to ink brands and burning brands as well as to label, cartons, etc. Such brands should bear the statement 'Sausage and cereal' if cereal is added in excess of five per cent, or 'Cereal added' if not in excess of five per cent."

(The service announcements of April 15, 1912, and July 15, 1912, last referred to, were marked "Complainant's Exhibit J.")

80 Judge Ferriss: I offer the regulation effective April 1, 1913, as pleaded and admitted, being the regulation in controversy, limiting the use of cereal to two per cent. I offer that as "Complainant's Exhibit K." That is contained in "Complainant's Exhibit E" attached to it as a separate leaf, between pages 26 and 27.

"Complainant's Exhibit K", last referred to, is in the words and figures as follows, to-wit:

Washington, D. C., Feb. 28, 1913.

For the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive name, under the authority conferred on

the Secretary of Agriculture by the provisions of the act of Congress, approved June 30, 1906, (34 Stat., 674), Regulation 18 is hereby amended by the addition of sections 15 and 16, to read as hereinafter set out.

JAMES WILSON,

Secretary of Agriculture.

(Section 16, Paragraph 1). Sausage shall not contain cereal in excess of two per cent: When cereal is added its presence shall be stated on the label or on the product.

(Paragraph 2). Water or ice shall not be added to sausage, except for the purpose of facilitating grinding, chopping and mixing, in which case the added water or ice shall not exceed three per cent, except as provided in the following paragraph:

(Paragraph 3). Sausages of the class which are smoked or cooked, such as Frankfurt style, Vienna style and Bologna style, may contain added water in excess of three per cent, but not in excess of an amount sufficient to make the product palatable. When water (in excess of three per cent) and cereal are added to this class of sausages the statement 'Sausage, water and cereal' shall appear on the label or on the product, but when no cereal is added the addition of water need not be stated."

81 Judge Ferriss: I now offer in evidence as "Complainant's Exhibit L" the regulation effective November 1, 1914, and read from page 45, Section 9, Paragraph 3:

"When cereal is added to any meat food product other than sausage in quantities not exceeding 5 per cent, the statement 'cereal added' shall appear on the label in a conspicuous manner contiguous to the name of the product, and if any such product contains cereal in quantities exceeding 5 per cent, then 'cereal' shall appear as a part of the name of the product in uniform size and style of letters, for example, 'potted meat and cereal:'"

I now read from "Complainant's Exhibit L," Paragraph 4, on page 38, Section 2. I read this, if your Honor please, in connection with the evidence as to a stencil which is put on the sausages:

"Inspected and passed sausages and other meat food products in animal casings, of the ordinary 'ring' variety or larger, shall bear on the casings the inspection legend and the number of the establishment. Inspected and passed

smoked sausages and other meat food products in animal casings, of the smaller varieties, such as Frankfort and Vienna styles, shall bear on the casings one or more marks to each chain or two or more marks to each bunch."

I now read from the same page, Paragraph 6:

"Any meat or product of such character or so small that it can not be marked with a brand, and which has been inspected and passed, but does not bear the inspection legend, may be transported in a closed container bearing the inspection legend and other marks required by these regulations."

(Paragraphs 4 and 6 last referred to were marked "Complainant's Exhibit M.")

Judge Ferriss: That is our case, if your Honor please.

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(Testimony for the Government.)

Thereupon the defendants, on their behalf, introduced the following evidence:

S2 GEORGE BUGELE, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, as follows:

#### Direct Examination

By Mr. Woodward:

Q. Give the stenographer your full name.

A. George Bugele.

Q. What is your occupation?

A. I am Government meat inspector at present.

Q. For how long have you been so engaged? A. 1906.

Q. Since 1906? A. Yes, sir.

Q. At what plant or plants have you been working since that time?

A. All the plants in St. Louis. I am supervisor going over all the plants.

Q. Are you at present engaged as inspector at the plant of the St. Louis Independent Packing Company?

A. I am there daily.

Q. How long have you been there daily, Mr. Bugele?

A. I have been there now for about eight years, daily.

Q. During that time have you had occasion to observe the manner and method of making sausages in the plaintiff's plant? A. Yes, sir.

Q. Explain briefly the amounts of cereal and water which the plaintiff has used in the manufacture of such sausages, if you know.

A. Why, they have been using cereals, from three [—] five per cent, and they have been using water to facilitate the mixing of the cereal.

83 Q. Do you have any idea of the percentage of water that is, Mr. Bugele?

A. They run three per cent and over.

The Court: Q. How much?

A. Three per cent and over.

Q. Of water?

A. Yes, depending on how much cereal they use.

Mr. Woodward: Q. Did the St. Louis Independent Packing Company ever discontinue the use of cereal and added water in their manufacture of sausages? A. Yes, sir.

Q. When?

A. Between May, 1913, and May, 1914, sometime in there.

Q. For about a year, then, they were not using either cereal or added water in the manufacture of their sausages?

A. Yes, sir.

Q. During that time did they continue to put up all the kinds of sausages which they had theretofore made?

A. Yes, sir.

Q. Did you notice or observe any difference in the binding qualities of the sausage during that period as compared with the period preceding? A. No, sir.

Q. Mr. Bugele, do you know whether or not the St. Louis Independent Packing Company ships sausages in interstate commerce to the state of Pennsylvania? A. Yes, sir.

Q. Do those sausages, or have they since 1911, contained any cereal?

A. No, sir, not since the law became effective in Pennsylvania, not with cereal.

Q. How long have you been familiar with the methods and manner of making sausages?

84 A. About twenty-eight years.

Q. State whether or not the use of cereal is necessary in the manufacture of sausage?

A. To my estimation, it is not.

Q. Would your answer be changed or varied according to the grades or kinds of meat that were used in making the sausage? A. No, sir.

Q. Can inferior meats, such as hearts and cheeks, be made into sausage without the addition of cereal? A. Yes, sir.

Q. For what purpose is cereal added to sausage in the manufacture of it? A. For gain, as far as I can see it.

The Court: Q. For what? A. The gain.

Mr. Woodward: Q. What do you mean by "gain?"

A. Well, it is cheaper; you make a cheaper sausage. Cereal is cheaper than the meat and it reduces the value of the product. It makes a cheaper product than it would to use all meat.

Q. Does the cereal absorb and retain more of water than could be retained by an ordinary sausage?

A. I think it does yes, sir.

Q. Has the plaintiff, the St. Louis Independent Packing Company, ever used cereal in the manufacture of its so-called summer sausages? A. Not that I ever knew of.

Q. Why cannot cereal be used in the manufacture of summer sausages? A. It don't keep so well.

Q. You mean by that, that they would sour?

A. Yes, sir.

85 Q. I believe you stated that you first learned the trade as a sausage maker some twenty years ago, Mr. Bugele? A. Yes, sir.

Q. At that time was it customary to use cereal in the manufacture of sausage?

A. No, sir, not where I was working.

Q. Where was that?

A. On the east side, under the Allerton administration, on the east side of the river.

Q. By "east side" you refer to East St. Louis?

A. Yes, sir.

Q. When, if you know, did the use of cereal in the manufacture of sausages become wide spread?

A. Well, that has been about twenty-five years ago, I think it was.

Q. Are you familiar with the other packing establishments in the City of St. Louis? A. Yes, sir.

Q. State whether or not the use of cereal is general in such packing plants in all of their kinds and brands of sausage? A. No, sir, it is not.

Q. In the sale of sausage, Mr. Bugele, is it possible for the purchaser to detect from the appearance of the sausage whether or not it contains cereal, or added water?

A. No, sir, a customer cannot tell that.

Q. What is that?

A. The customer is not able to tell that.

Q. State if you know how long it takes, ordinarily, for the sausages of the St. Louis Independent Packing Company to reach the consumer from the time they are first manufactured?

86 A. Really, I don't know how far they ship the furthest sausage. I couldn't answer that question. In the city it will take over ten or twelve hours after it is made.

Q. Then answer the question merely with reference to St. Louis.

A. In St. Louis it can usually be delivered in ten to twelve hours after it is made. Some of it is delivered—

Q. To the ultimate consumer? A. Yes, sir.

Q. As it is understood in the trade, how is sausage defined? A. I don't understand what you mean.

Q. What is understood by the name "sausage" in the trade? A. Sausage?

Q. Yes; what is it composed of as understood by the trade, in other words?

A. Well, it is different sausages: bologna, wieners, franks, liver sausage, blood sausage.

Q. All of those, then, are composed of ground meats and added spices? A. Yes, sir.

Q. Is it understood by the trade that sausage is to contain any cereal or added water? A. No, sir.

#### Cross-Examination

By Mr. Stratton:

Q. What do you mean, Mr. Bugele, by the statement that it is not understood by the trade that cereal is added?

A. The consumer does not know it. That is what I mean.

Q. Counsel was asking about the trade: What is meant by the "trade" as you used it? Did you mean the consumer or the retail dealer?

A. Well, I meant the consumer. I may have misunderstood the question.

87 Q. Suppose that the casing is marked with the words "sausage and cereal:" Does the consumer not then understand that cereal is used?

A. They could if they seen it, yes.

Q. If it is put on the large casings and on every three, four, or five of the small casings, or links, the consumer would, ordinarily, have an opportunity to see it, would he not? A. Yes, sir.

Q. You said the purchaser cannot detect the presence of cereal of water in the sausage: The consumer is after a palatable article, is he not? A. Yes, sir.

Q. And does not concern himself with how it is made, if it is made of wholesome, nutritious ingredients: Is not that correct? A. I couldn't answer about what the public thinks.

Q. What was your experience in the manufacture of sausage prior to your connection with the Government service in 1906? A. What was my experience?

Q. Yes.

A. To make sausage at the Allerton Institution over on the east side.

Q. What sort of an institution is that?

A. Dressed beef, pork, mutton.

Q. Is it a retail establishment, or wholesale?

A. Wholesale and retail.

Q. How much business did they do in sausage in the year?

A. Well, they done, I suppose, right around a million or two million pounds.

Q. Did they use cereal in sausage? A. No, sir.

Q. Up to what date did they not use cereal in sausage?

88 A. Well, they never did use it until after they changed hands to Morris. When Morris bought the place then the cereal came into the plant.

Q. When did Morris buy the place?

A. That I don't remember; about '89, I think; I am not sure.

Q. 1889?

A. I think somewhere along there; I am not sure.

Q. So prior to that time the Allerton plant used no cereal in the sausage? A. No, sir.

Q. But after 1889 the Allerton plant used cereal in sausage? A. No, sir. Morris bought them out.

Q. The plant that had been the Allerton plant used cereal in sausage? A. Yes, after Morris bought it out.

Q. And as you remember it the change was made in 1889?

A. Somewhere about that.

Q. About that time?

A. But I want you to understand that I did not have charge of that sausage room no more after that.

Q. That is after the Morris people took it over?

A. Yes, that is after the Morris people took it over.

Q. You said that during part of the year from 1913, to 1914, in the St. Louis Independent Company plant no cereal was used? A. Yes, sir.

Q. How long a period or interval of time was that?

A. It was somewhere about a year.

Q. Do you know anything about the effect of the discontinuance of the use of cereal upon the volume of their business during that year?

A. No, sir, I do not.

89 Q. They might have made very much less sausage during that time than before or since?

A. I don't think they did.

Q. Why do you say that you don't think they did?



A. Because the business was always going on just the same. I was there every day to see the business going on.

Q. Are you prepared to testify that they did as much business during that year as prior?

A. No, sir, I couldn't because I don't go over the books. I haven't kept track of their manufacture.

Q. What do you know about the binding quality of cereal? Has it a binding quality? A. It has.

Q. Is that a desirable quality in the manufacture of sausage? A. Not necessarily.

Q. Sausage does not need to have a binder of any kind?

A. Yes, but not cereal for a binder.

Q. Sausage does require a binder of some kind?

A. Yes; some meats do; some sausage meats do.

Q. So that a binder is necessary? A. For some meats.

Q. For some meats? A. Yes, sir.

Q. There are some kinds of meats that do not require a binder? A. Yes, sir.

Q. And there are some kinds of meats that do require a binder in order— A. Not a cereal binder.

Q. —in order to make a satisfactory sausage?

A. Not a cereal binder.

Q. But they require a binder? A. Yes, sir.

Q. How many kinds of binders are there in the manufacture of sausage?

90 A. There are cereal binder and then there is also binders that we use for different sausage, different kinds of meats for binders.

Q. What other kinds of binders are there besides cereal in the manufacture of sausage? A. Beef and pork.

Q. What kind of beef?

A. They call it bull beef, but any ordinary good beef makes a binder. It don't necessarily have to be bull beef. Any good beef will make a binder.

Q. Can you make a satisfactory sausage without the use of cereal out of the ordinary beef as it comes through a plant?

A. Yes, sir.

Q. Is it not a fact that the sausages that are made without binders are bull beef? A. No, sir.

Q. What other binders are used in the manufacture of sausage besides flour? A. Beef and pork.

Q. In all sausages is contained a binder of some kind?

A. Why, certainly. Sausage all has a binder to it.

Q. When is cereal used as a binder, with what class of beef? A. That is a question I cannot answer.

Q. With what class of meat is it used?

A. They use it, by using short meats is when they use the cereal.

Q. That is, trimmings?

A. But they don't stop to use it. They use it elsewhere.

Q. When you say "short meats," you mean trimmings which would otherwise be—

A. I mean cheap meat and hearts; where cheeks, ears and hearts are used alone cereal helps them bind, but beef  
91 can be used in place of cereal.

Q. Suppose the beef was cow beef. Could you make a sausage out of that without the aid of cereal, that is, a satisfactory sausage? A. Yes, sir.

Q. Would you not need a binder?

A. It is a binder in itself.

Q. Is there a sufficient binder in the ordinary cow beef to make a good sausage? A. Yes, sir.

Q. How about the ordinary beef trimmings? Can you make a good sausage out of ordinary beef trimmings without the aid of a binder?

A. What do you call "beef trimmings?"

Q. They are commercially known as beef trimmings.

A. If it is regular beef binding trimming, of course, we can make sausage out of that without cereal added.

Q. The use of cereal reduces the cost of the sausage?

A. Yes, sir.

Q. Is it not a fact that that reduction in cost is reflected in the price of the finished product?

A. I don't know, sir.

Q. Is it not a fact that the beef that is used for the manufacture of sausage that is shipped to Pennsylvania is uniformly a bull beef? A. No, sir.

Q. And is not that used because of its special dryness?

A. Special what?

Q. Dryness, lack of moisture? A. No, sir.

Q. Is not that bull beef used because of its binding qualities? A. Yes, sir.

92 Q. Especial binding qualities?

A. Yes, special binding qualities in bull beef.

Q. Where that bull beef is used cereal is not necessary: Is that correct? A. Certainly not.

Q. Is not that the kind of beef that is used in the manufacture of sausage for the state of Pennsylvania? A. No, sir.

Q. What kind of beef is used?

A. They use ordinary beef, bull beef, and ordinary beef.

Q. Any kind of beef?

A. Well, straight beef, chucks, blades, fore-quarters.

Q. Are those cut from any particular class of cattle?

A. They are generally cut from their cut-up cattle, poor grade of cattle.

Q. What grade? A. Poor grade of cattle.

Q. By "poor grade of cattle" you mean the heavy, stocky grade?

A. Not necessarily heavy, no, sir. Poor grade of cattle, not beef cattle, sausage cattle.

Q. Where moisture is added in the manufacture of sausage does some of that moisture pass off in the form of evaporation and otherwise so that the finished product does not contain the same amount?

A. The moisture that is added, yes, it shrinks when it is smoked.

Q. So if you were to take five per cent of cereal, ten per cent of moisture (water), and add it in the manufacture of sausage, that ten per cent of added moisture, would, as a matter of fact, entirely disappear in the process of manufacture, would it not?

93 A. I don't think so; not all.

Q. Why do you say that?

A. Because the cereal holds a certain amount of the water.

Q. What per cent of moisture is there in the ordinary beef?

A. I couldn't say.

Q. Is it not a fact that there is about seventy per cent of moisture in the ordinary beef?

A. I couldn't say. I never made any test of that.

Q. Do you know what the customary form of summer sausage is, how it is made and when it is made? A. Yes, sir.

Q. When is it made?

A. It is made at all times.

Q. Do they make summer sausage in the summer time?

A. Yes, in the Independent Company's plant they do.

Q. Is the sausage which the St. Louis Independent Packing Company makes in the summer time a standard summer sausage? A. No, sir, it would not be standard.

Q. What is the standard summer sausage?

A. Made in the winter.

Q. How is it made?

A. Made of beef and pork; very little beef, mostly pork, spices, and then it is smoked.

Q. And then smoked? A. Yes, sir.

Q. And air dried, is it not? A. Yes, sir.

Q. It becomes very hard and dry?

A. Some of it and some not.

Q. It is necessary for it—

A. The more it dries the more it shrinks. A great many of them get rid of it before it gets too dry, to save shrinkage.

94 Q. It is necessary to make it pretty hard and dry to keep it until summer, is it not?

A. It will dry itself.

Q. It is necessary to have it dry itself?

A. Not necessarily, no, sir.

Q. Will a damp sausage keep from winter until summer?

A. Yes, if kept in the proper place, a cool place, not heated.

Q. In ordinary cool temperature will it keep from summer to winter, or winter to summer? A. Yes, sir.

Q. The summer sausage which you speak of as being made by the St. Louis Independent Packing Company in the summer time is not air dried, is it?

A. No, sir, they make it and get rid of it right away, sell it while it is fresh. They don't carry a stock on hand.

Q. It is not a standard summer sausage, is it?

A. No, sir.

Q. It is sausage made for prompt sale? A. Yes, sir.

Q. Sort of an imitation of summer sausage?

A. No, it is not imitation. It is summer sausage, and classed as summer sausage.

Q. I beg your pardon?

A. No, it is not imitation. It is summer sausage and classed as summer sausage.

Q. But it is a special kind of summer sausage?

A. No. If it was made in the winter time it would hold up much better than it does in the summer time, the whole sausage.

Q. It would require more drying?

95 A. It is colder and requires more drying and has more time to dry.

Q. This summer sausage that the St. Louis Independent Packing Company make in the summer time is made for prompt sale? I think you answered that. A. Yes, sir.

Q. And the reason for that is that it has not the keeping qualities that it would have if it was—

A. What is that?

Q. The reason for that is that it has not the keeping qualities that it would have if it was made in the winter time and had the proper air and other drying and smoking?

A. It is done to save the shrinking.

#### Redirect Examination

By Mr. Woodward:

Q. During the time you have testified the St. Louis Independent Packing Company made sausage without the addition of cereal and water, did they use hearts and cheek meats? A. Yes, sir.

Q. About how long is the so-called summer sausage kept before it is—you have testified it was made in the winter

for consumption the following summer: Approximately how long is it usually kept?

A. Well, they have different formulas. Some rush it through quick and some keep it longer. It is made up into a mixture, ground up and made into a mixture and left stand a few days and worked again.

Q. Is it all kept a matter of three or four months?

A. Yes, it is stuffed and hung up and dried.

Q. That is all under packing house conditions?

A. Yes, sir.

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96 FLOYD W. ROBINSON, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, as follows:

#### Direct Examination

By Mr. Woodward:

Q. Will you give the stenographer your full name and occupation? A. Floyd W. Robinson. I am a chemist.

Q. I believe you are now consulting chemist in the city of Detroit, Michigan? A. That is correct, yes, sir.

Q. You were formerly employed by the United States Government? A. Yes, sir.

Q. In what capacity?

A. I was Food and Drug Inspection chemist.

Q. At what place? A. New York.

Q. During that time did you ever have occasion to make experiments to determine the keeping qualities of sausage?

A. Not during that period. It was previous to that.

Q. You have made such experiments, however?

A. Yes, sir.

Q. That was before the time you say you were employed by the Government? A. Yes, sir.

Q. State to the Court briefly what the result of your experiments was.

A. The experiments that I have conducted in the work that I have done on sausage was during the time I was state analyst of Michigan, and related to the keeping qualities of sausage with and without cereal, and the keeping qualities with and without water. It was a rather extended piece of work we did on sausage, and covered a great many  
97 points.

Q. Go on and state what you did, and the results you obtained.

A. In the State of Michigan the question arose about the propriety of the use of cereals and water in sausage, and was taken up by the Michigan Dairy and Food Department.

We determined the prevalence in that section of the country of the use of cereal and water in sausage; the extent to which cereal was used and the extent to which water was used, and as to whether it was necessary or not. I do not quite understand what you wish me to detail, Mr. Woodward.

Q. What is the effect upon the keeping quality of sausages, comparing those made without the cereal or water and those made with cereal and water?

A. Well, the sausages that were made without cereal and water have superior keeping qualities to those that are made with cereal and water.

Q. How much longer will they keep?

A. They will keep, under the same conditions, very much longer. I cannot state the exact time, but as one evidence of that, all types of sausages—to the best of my memory—which were intended for long keeping were made without cereal and water.

Q. Is the keeping quality affected by the amount of cereal or amount of water present in the sausage?

A. Yes, to a certain extent.

Q. Will a sausage with five per cent of cereal keep as long as a sausage with ten per cent of cereal added?

98 A. That depends to a considerable extent upon the amount of water which accompanies the cereal. The more water which accompanies the cereal the less the keeping time. It seems to be the water factor quite as much as the cereal factor.

Q. How much water will the ordinary cereals used absorb and retain, in the manufacture of sausage?

A. Corn flour will hold from five to fifty per cent of water.

Q. So that a sausage containing five per cent of cereal would have how much water, if water were added to the full extent to which the cereal would absorb it?

A. Fifty per cent.

Q. Would that sausage keep as well as a sausage which had ten per cent of cereal added, with as much water as the cereal would absorb?

A. It would not—pardon me. The sausage with the greater quantity of water, the sausage with the greater quantity of cereal, will not keep as well as the one with the less quantity of cereal and the one with the less quantity of cereal and water.

Q. So the keeping qualities of sausage vary directly with the proportion of cereal and water which you find present in the sausage?

A. Not all sausages vary in that way, but that is one of the variable factors.

Q. You have made sausages yourself, I believe, Mr. Robinson? A. Yes, sir.

Q. Is the use of cereal necessary in the manufacture of sausage? A. It is not.

Q. Would your answer be changed if cheeks and hearts and that class of meats were used in the manufacture of sausage? A. It would not.

Q. You can make sausage of cheeks and hearts, and the lower cuts of meats, without the addition of cereal or water: Is that true? A. Yes, sir.

Q. For what purpose is the cereal added to the sausage?

A. The cereal has two or three purposes: One of them is to reduce the price, and another is to disguise the addition of water.

Q. Does the use of cereal in the lower class of meats tend to hide or disguise the character of meats used in that sausage? A. Very much so.

Q. Do you think you could tell a sausage made from cheeks and hearts if it did not have cereal added?

A. It would be very difficult to do so. If you had cereal added it would be very difficult to do so.

Q. If you did not have cereal added in others—

A. Yes, you could easily tell the sausage made from inferior materials such as hearts, snouts, ears, and so forth, if it did not contain some disguising agent.

Q. Is cereal such a disguising agent? A. Yes, it is.

#### Cross-Examination

By Judge Ferriss:

Q. Where do you say you live? A. In Detroit.

Q. What position do you have there as chemist?

A. I am director of the Dairy and Food Department of the Detroit testing laboratory.

Q. You are director of the Dairy and Food Department of the Detroit testing laboratory?

A. Yes, commercial laboratory.

Q. Were you employed by the state in that controversy which arose there about—

A. I was the state official at that time.

Q. What is that?

A. I was state analyst at that time, of Michigan.

Q. Did you testify in the case of Bird vs. Armour?

A. Yes, sir.

Q. That was a case in which an attack was made, a long controversy over the use of cereal in sausage?

A. Cereal and water were the questions at issue, yes, sir.

Q. Two hundred or three hundred witnesses were examined in that case, were they not? A. A good many.

Q. Do you remember what the outcome of the case was?

A. Why, the outcome of the case—it was an application for an injunction by Armour & Company in the Ingham County Circuit Court. The application was refused and it was then referred to the State Supreme Court, where the injunction was sustained under certain provisions.

Q. You know that the fact is that both the lower court and the Supreme Court of Michigan decided that sausage and cereal was a wholesome product, and that people had a right to make it and sell it, but that they must indicate to the consumer the name? Was not that the gist of it?

101 A. The question of wholesomeness did not come up in the case.

Q. They decided that they had a right to use cereal in sausage? A. Provided it was properly labeled.

Q. Provided it was properly labeled? A. Yes, sir.

Q. That was the gist of that whole fight?

A. That is correct.

Q. All the evidence was taken pro and con, experts testified on both sides, and the Court found as a fact that cereal had been used in sausage for many years, and that the packers had a right to use cereal. The only limitation they put on was that it should be labeled: That is correct?

A. Not quite correct, no, sir.

Q. Perhaps you know the decision better than I do.

A. I am familiar with the decision.

The Court: (To the witness) State it.

A. The decision was that the cereal in sausage was an adulterant, and on account thereof it should be labeled if used. Unless it was labeled it would be considered as—

Judge Ferriss: Q. Under the pure food law—

A. Yes, sir.

Q. Which dealt with adulteration? A. Yes, sir.

Q. The question in this Meat Inspection Act is not a question of adulteration, but a question of healthfulness: Do you understand that distinction?

A. I haven't gone into that.

The Court: Q. The proceeding up there was under a state law and not under the Federal law? A. That is correct.

Judge Ferriss: Q. Have you been a practical sausage maker? A. I have not.

Q. Have you been a practical dealer in sausage?



A. No, sir.

Q. Have you ever been connected as a proprietor or employe of a packing establishment?

A. I have not.

Q. All you know about sausage is what you have learned in the laboratory?

A. I have learned a good deal in the laboratory and I have learned from the trade in general; I mean, consumers in general.

Q. You were employed by the state?

A. Yes, sir.

Q. To help establish, if possible, the fact that the use of cereal in sausage was improper?

A. To inquire into the use of cereal in sausage.

Q. You testified in that suit? A. I did.

Q. You knew when you were making your inquiries that it was for that purpose?

A. When I was making the examination it was to find out the fact. My testimony later was to substantiate it.

Q. I do not mean that you were trying to color your testimony. I do not mean that at all. I am not questioning your honesty at all.

[—] You say that sausage without cereal and water keeps better? A. Yes, sir.

Q. How about dry cereal, is that liable to decompose?

A. Not easily, no, sir.

Q. That will keep better than fresh meat?

A. Yes, sir.

Q. Dry cereal in the form, we will say, of bread, or  
103 cornbread, keeps much better than fresh meat, does it not?

A. Cereal in the form of bread does not keep very well.

Q. The water is dried out of it. How much water has the human body?

A. About from sixty to eighty per cent.

Q. It is hard to realize that we are so much water, but that is the fact. How does the amount of water in the human body compare with beef cattle?

A. Why, I should say about the same.

Q. About the same? A. Yes, sir.

Q. Then there is in meat that is used in sausages, from sixty to eighty per cent of moisture? A. Yes, sir.

Q. How much moisture is there in corn flour?

A. Corn flour will run from four to twelve per cent of moisture.

Q. There is not very much moisture in it?

A. Not a great deal.

Q. At what point of moisture will meat decompose, do you know?

A. Not the critical line, no, sir. It can be decomposed at all points, but the lower the moisture in it the better its keeping qualities.

Q. After you get to a certain point of moisture what would you say was the point of moisture favorable for bacterial action?

A. There is no point above which you could say bacteria will grow, and below which you can say they will not grow, because bacteria will thrive in dry meat.

Q. I am talking about what is found as a matter of ordinary experience; What would you say? We know meat can be dried out on the plains right in the open air.

A. Yes, sir.

104 Q. That is because of the rapid evaporation of the moisture?

A. Yes; I presume twenty-five or thirty per cent would keep for a considerable period of time.

Q. When you get to say twenty or twenty-five per cent, you reach a favorable condition for bacterial action, is not that true? A. It begins to get more favorable.

Q. So that fresh meat without any cereal, having from sixty to eighty per cent of moisture in it, is in a favorable condition by itself for bacterial action?

A. Yes, sir.

Q. After you get above twenty-five per cent, do you mean to say that if you increase the moisture beyond that you increase the danger of bacterial action?

A. Yes, sir. The more moisture you put in the more—

Q. If there is eighty per cent of moisture there is more danger of bacterial action than there is in sixty per cent?

A. Well, if that is added water, yes. Of course, if the sixty percent moisture content is caused by the fact that it contains a considerable quantity of fat, the remaining lean meat in the carcass still contains the normal content of water.

Q. Is it not a fact that up to a certain point of moisture the danger of bacterial action is slight?

A. I do not know exactly what the moisture content of jerked dry meats is, but I should say, trying to answer your question, that from twenty-five to thirty per cent of moisture—that is, using your calculation, the percentage of lean meat as a basis, that the bacterial growth and spoilage will increase.

105 Q. If you add cereal to the product and you add water, you do not really add to that danger because it is already there in the natural meat?

A. You add to the danger because you have in addition a product which is very prone to spoil itself when an exceptional amount of water is added to it.

Q. You have what?

A. When you put any moisture in a cereal above that which it naturally contains, for instance, corn flour, with its ten per cent of moisture, and then you add ten per cent of moisture more to that so it will carry twenty per cent, that will sour and spoil very easily.

Q. If you had it by itself, but if you mix it with meat and that meat itself has a moisture content of say seventy per cent, it has already passed the safety point for bacterial action, has it not? A. No, it has not.

Q. You say that twenty-five per cent is a favorable point for bacterial action: Then if meat has seventy per cent of moisture it has passed that point, has it not?

A. If meat has seventy per cent of moisture it has passed what point? We evidently do not understand each other.

Q. The point favorable to bacterial action.

A. No, it has not. Considering the meat to be lean meat, if it has twenty-five or thirty per cent then it is slow to spoil due to bacterial action, but when you get the moisture high, when you get the moisture up then is when a spoiling in meat takes place.

Q. I understand that perfectly well. When you get  
106 above the point of twenty-five or thirty per cent which you fix, then the bacterial action is rapid?

A. Yes, sir.

Q. And it does not make much difference as far as the action of the bacteria is concerned, how much higher you go in moisture, does it?

A. The higher the moisture the more fluid the product is and consequently the more easy for the invasion of bacteria and spoilage.

Q. Then your position is that with moisture at seventy per cent there is greater danger of bacterial action than there is at sixty or fifty per cent?

A. If that eighty per cent moisture that you speak of is all lean meat. It is possible for meat to have only sixty per cent moisture and contain accordingly just as much moisture as meat which contains eighty, because of the fact that the sixty per cent moisture has been reduced, not by drying, but with a mixture of fat, which does not influence the point I have raised.

Q. Do you know whether the different kinds of meat have different degrees of moisture?

A. Yes, they do; different cuts of meat.

Q. Do you know what is meant by "binder" in sausage?

A. Yes, sir.

Q. What is it?

A. It is a substance which mixed with the other products in the sausage tends to hold it together.

Q. It has a cohesive effect?

A. Adhesive, I expect you would call it.

Q. Is it desirable?

A. To a point it is desirable.

107 Q. Do all different kinds of meat have the same binding qualities? A. They do not.

Q. Can you explain what the difference is, or what—

A. Certain types of meat, such as the ordinary cuts of beef, have pretty fair binding qualities. The organs, such as the heart, are considered to have rather poor binding quality.

Q. Do you know what they call short meats?

A. Yes, sir.

Q. What does that mean?

A. That means meat without length of fiber to it, short fiber.

Q. Have short meats more need of a binder to assist in the cohesion than the long meats?

A. It is so considered, yes, sir.

Q. Is it not a fact that short meats are used very largely in sausages, trimmings, etc.?

A. Trimmings are used a good deal, and short meats a good deal.

Q. And hearts and snouts?

A. Yes, hearts, snouts and ears are used a good deal.

Q. They are all recognized as being proper ingredients of sausage? A. More or less proper, yes, sir.

Q. They are all wholesome ingredients, are they not, and the Government allows them to be used?

A. They are allowed to be used.

Q. That settles it, as far as that is concerned?

A. Yes, that is a better way to put it.

Q. The Government allows cereal to be used?

A. I so understand.

108 Q. The Government allows cereal to be used without any limit as to quantity? A. I do not know.

Q. You heard me read a regulation that in meat food products it could be used above five per cent?

A. I know it can be used provided it is properly labeled.

Q. It is just likely to spoil in other chopped meats as it is in sausage, is it not? A. Well, that is possible.

Q. There is no difference, they are all chopped meats?

A. It may be used provided it is properly labeled so people will understand just what it is.

#### Redirect Examination

By Mr. Woodward:

Q. Those other meats and food products in which it is permissible to use corn flour and cereals of that sort, are all canned and so-called potted meats, are they not?

A. I think they are, yes, sir.

Q. And are sterilized before they are potted or canned?

A. Yes, sir.

Q. Does the sterilization through which they go kill the bacteria in the meat? A. It does.

#### Recross Examination

By Judge Ferriss:

Q. Do you know as a matter of fact how long sausages are kept in general practice before they are consumed  
109 in the market, how often the retailer gets a supply from the packer?

A. The retailer in a local market in a small town gets his supply every two or three days.

Q. Do you know that in a place like St. Louis he gets it every day? A. I should think he might.

Q. There is no question about sausage and cereal keeping twenty-four hours, is there?

A. Yes, I think that is quite an important question in a climate such as we have here.

Q. As long as it is in a cooler it keeps alright?

A. As long as it is kept cold—

Q. One witness has testified here (the inspector himself) that it reaches the consumer in twelve hours from the time it is made: Do you consider that there is any danger of it spoiling in twelve hours?

A. I would not expect it would spoil in twelve hours.

#### Redirect Examination

By Mr. Woodward:

Q. Would you consider there would be any danger of sausage shipped from here to trade in New York, by any possibility spoiling before it could reach the consumer?

A. Not in the refrigerator cars that they use now. It should carry that far. The question is not so much its spoiling going to the retailer as it is the consumer's end of it after he gets hold of it.

Q. In other words, the moment it gets out of the refrigerator cars? A. Yes, sir.

Mr. Woodward: That is all.

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110 Mr. Ferriss: I am letting all this testimony go in without any objection because I know the Court is going to take the testimony fully on both sides as the parties offer it, but I want to call attention of the Court to the fact that the question we are trying is the power of the Secretary to make this regulation, and I think, strictly speaking, all this evidence as to how long it will keep is incompetent.

The Court: As I understand it, we are trying something else besides that question of the power of the Secretary to make the order.

Judge Ferriss: The question here is whether or not this is a wholesome product free from dyes and chemicals—

The Court: Suppose he decides it is not a wholesome product, free from dyes and chemicals, and so forth, from the evidence he has before him: What have I to do about it? That is the question.

Judge Ferriss: That is a question your Honor has to decide on the facts.

The Court: In other words, if the Secretary of Agriculture decides that it is an unwholesome food, then the question is for the Court to decide whether the Secretary is right or not—

Judge Ferriss: No, sir, that is not the question. The Secretary of Agriculture has not adopted this regulation on any theory of its being an unwholesome food, but on the theory to prevent use of an unlawful name. It is on that branch of the law—

111 The Court: If I understood that this case involved only the question of the right of the Secretary to make the order which he did make, I would stop the case right now.

Judge Ferriss: That is the ultimate question, of course.

The Court: If that is the ultimate question, and the only question in the case, then I have nothing further to do, but I am listening to this testimony to find out what kind of product is being made. I know the Court of Appeals said that the Secretary had no right to make this specific order. That is the law in this case, as far as that is concerned, but the question is as to what else the Secretary has done; what else the Government claims he has a right to do. You may go on with your testimony. I will hear the whole thing.

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112 T. M. PRICE, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, as follows:

Direct Examination

By Mr. Woodward:

Q. State your full name, Mr. Price? A. T. M. Price.

Q. What is your occupation? A. Chemist.

Q. By whom are you now employed?

A. By the United States Government.

Q. How long have you been so employed?

A. Since 1902.

Q. Have you ever been called upon, Mr. Price, to make experiments showing the effect of adding cereal and water to sausage? A. Yes, I have.

Q. I show you a table marked "14-A" and another marked "14-B", and ask you if that is a tabulation of the results which you obtained from those experiments?

A. It is the result of some of the experiments, yes, sir.

Q. If you will, explain to the Court briefly what the [result] of those experiments were.

Judge Ferriss: I would like to see that. Let me look at that a minute (examining papers).

The Court: (To the witness) Go on and state.

The Witness: These experiments were conducted, in fact, with a view of determining whether sausage made without the addition of cereal or water; with the addition of a certain percentage of water without cereal; with the addition of a certain percentage of cereal without water, and with the addition of both cereal and water, to see what the keeping qualities of the sausage were; what the gain in weight of the finished product was, and also the monetary gain that would be derived from taking the same quantity of meat at the beginning, with the addition of varieties of water and cereal.

113 Mr. Woodward: Q. Did you find there was any difference between the keeping qualities of sausage which did not contain cereal and water, and sausage which contained two per cent of cereal and three per cent of added water?

A. We found that sausage without the addition of cereal or water kept better than sausage with the addition of over two per cent cereal and three per cent water.

Q. Did that result vary according to the amount of cereal and water used in the sausage?

A. The greater the cereal and water the earlier it deteriorated.

Q. Do you recall without reference to the figures which you have here, what the time was in those various cases?

A. I remember in some cases we found that the sausage with an addition of over two per cent cereal and three per cent water would sour in seven days. That we kept in the refrigerator, under refrigerator conditions.

Q. Take this table now and turn to the sausage which contained ten per cent cereal and twenty per cent water: I believe there is one—

A. Yes, ten per cent cereal and twenty per cent water.

Q. Go through with that experiment and explain to  
114 the Court what that showed.

A. It showed that if you took twenty per cent of water, and ten per cent of cereal, and seventy pounds of meat, you would get practically the same amount of finished product as if you took one hundred pounds of meat to begin with, without the addition of any water or cereal. It also showed that this product was mouldy in six days.

Q. It was mouldy in six days? A. Yes, sir.

Q. Now refer to the sausage with ten per cent added cereal and twenty per cent added water: After it was smoked how many pounds did you have?

A. We had ninety-three pounds, plus; 93.7.

Q. Then, from seventy pounds of meat, twenty per cent of water and ten per cent of cereal, you got ninety-three pounds of meat or finished product after it was smoked?

A. Yes, sausage.

Q. After you smoked sausage made without any cereal or water, how many pounds of finished product did you have?

A. When we took one hundred pounds of meat then (and only seventy pounds before) we only got ninety-two pounds of the finished product.

Q. In other words, in a sausage which contained ten per cent cereal, twenty per cent added water, you obtained through the smoking process more of the finished product than you obtained from an equal weight of pure meat sausage?

Judge Ferriss: Q. How much more?

A. Yes. We gathered—when we took one hundred  
115 pounds of pure meat, we only got ninety-two pounds of the finished product, whereas when we took seventy pounds of meat with the addition of twenty per cent of water and ten per cent of cereal we got over ninety-three pounds of the finished product.

Mr. Woodward: Q. I ask you to sum up, briefly, the time periods in which the various kinds of sausages soured, or became mouldy, or putrid, as the various cases may be.



A. Taken in the fresh condition, the sausage without any added water or added cereal was mouldy in ten days. This is under refrigerator conditions in the packing house.

The sausage with the addition of ten per cent water and two per cent cereal was mouldy in six days.

With the addition of ten per cent water and five per cent cereal it was sour in six days; mouldy and sour, both.

With twenty per cent water added and ten per cent added cereal, it was mouldy in six days.

Judge Ferriss: Q. How much water was that?

A. Twenty per cent added water and ten per cent cereal.

Mr. Woodward: Q. Then it is from these experiments that you have conducted that you base your conclusion that sausage with added cereal and water will not keep as long as sausage without any added cereal or water?

A. Yes, that with the addition of other experiments. We conducted others along the same line. In the first part of that article you will see others along the same line (indicating paper).

Q. In your opinion, those keeping qualities varied  
116 directly with the amount of the cereal and water which was placed in the sausage?

A. Yes, it depends on the water and cereal together.

The Court: Q. When was this experiment made with reference to the time when the Secretary issued this order that is in question, was it before or after?

A. It was made after that. It was made within the last year.

Mr. Woodward: Q. This particular experiment to which you refer now? A. Yes, sir.

Q. Do you know whether or not similar experiments were not made by the Department before the Secretary issued his order?

A. They were not made by me. I am not certain about the Department.

Q. Do you know whether or not a hearing was had before this order was issued? A. No, sir.

#### Cross-Examination

By Judge Ferriss:

Q. You say you are employed by the Government?

A. Yes, sir.

Q. Who directed you to make these experiments?

A. I directed the work myself. I was not directed by anyone. I have charge of the laboratories connected with this special service.

Q. You made it on your own initiative? A. Yes, sir.

Q. For the purposes of this case?

A. To determine where we stood, yes, sir.

117 Q. Where did you make them, in the laboratory?

A. They were made in a packing house, one of the packing houses in Washington.

Q. When you used meat without cereal what did you have with the meat? A. You mean the kind of meat we had?

Q. Yes. A. Seven per cent beef, thirty per cent pork.

Q. Did you use anything else besides the meat?

A. Spices.

Q. What spices?

A. Pepper and sage, and some salt.

Q. What kind of sausage were you making?

A. Well, we were making sausage that might be taken for fresh sausage; what they call a fresh sausage, or sausage that might be made and passed as adulterated pork sausage.

Q. You were not making smoked sausage? A. No, sir.

Q. You were making fresh sausage: How much salt did you use?

A. I don't know as I can say, exactly. It was something in the ounces per ten pounds. I think four ounces to ten pounds. Four ounces of salt to ten pounds of meat. I don't know as that is the exact figure. I had to figure it out according to the packing house formula.

Q. Do you know whether that is the proportion ordinarily used?

A. That is the formula the packing house gave us as the amount of salt they usually used in that sort of sausage.

Q. I understand you to say when you used the cereal and water in this mixture that you got about a pound more product at the end than you did when you did not use it?

A. I say, when I added twenty per cent of water and  
118 ten per cent of cereal to seventy pounds of meat we got more finished product than we did taking one hundred pounds of meat without the addition of any cereal.

Q. You got about a pound more?

A. About a pound more is right.

Q. Do you know anything about the practical business of packing houses, shipping and selling? A. No, I do not.

Q. Have you ever had anything to do with it? A. No, sir.

Q. You never, of course, have sold meat? A. No, sir.

Q. You never had to deal with it practically?

A. Absolutely not.

Q. You have come at this thing as a scientist and your work has been along scientific lines?

A. Yes, altogether.

Q. Do scientific lines always coincide with practical experience? A. We try to make them coincide.

Q. I know you do, but do they always do it?

A. Well, I don't know as I can speak broadly on that subject.

Q. Are you posted as to the different cuts of meat, as to their binding qualities? A. No, sir.

Q. You don't know anything about that? A. No, sir.

Q. Meat is meat, as far as you are concerned?

A. Yes, sir.

Q. You do not know anything about how long it takes the fresh meat to reach the consumer, on the average?

A. No, sir.

Q. You know nothing about that? A. No, sir.

Q. If you were given to understand by practical packers that the finished product reaches the consumer within, say forty-eight hours from the time it is manufactured, then under all your experiments the sausage would be in a good state of preservation?

A. Kept under the same conditions I kept those, yes, sir.

Q. You spoke about six days and ten days: If the product is consumed within six days—

A. If the product is kept under the same condition I kept it, under refrigerator condition.

Q. I was assuming that. Even if it should spoil in six days it would be no harm to the public if it was consumed inside of six days, under the same conditions: That is correct, is it not?

A. No, I don't see how it could harm them if they consumed it before it spoiled.

Q. Were you consulted in Washington with regard to fixing the proper amount of cereal to permit in sausage?

A. I was not consulted with regard to this, no. I did not have charge of the work at that time.

Q. But it would be within your province to consider that question, would it not?

A. At present, it would, yes, sir.

Q. How do you explain the fact that the Government still permits cereal in unlimited quantities in other meat food products than sausage?

A. Well, it is a cooked material. It is sterilized, usually, in a can container, and it is cooked to some extent, so that it breaks up the starch cells and is easily digested.

Q. Do you mean to say that all other—

120 A. I mean such a thing as loaves, where such cereal is permitted.

Q. Are you familiar with the method of preparing all—

A. As a finished product, as I get them in the laboratory, yes.

Q. But the Government does permit the use of cereal, without any limit, in other meat food products?

A. I won't say in other meat food products; in certain meat food products.

Q. In all meat food products except sausage: Does not the regulation so provide?

A. Yes, provided it is not named sausage, I believe.

Q. Meat food products other than sausage? A. Yes, sir.

Q. If they have cereal up to five per cent they have a certain label, and if it exceeds five per cent it has a certain label: That is correct, is it not? A. I believe you are right there.

Q. Does not that regulation recognize by that the wholesomeness and keeping quality of cereal?

A. Does it recognize that?

Q. Yes

A. It recognizes, I think, that those products usually put up in tin containers are cooked more thoroughly.

Q. The regulation does not say anything about containers, it says, "meat food products."

A. At the same time, it is based on the knowledge of how they put the products up.

121 Q. I do not know what it is based on, I simply know what it says. You made experiments with three per cent water, ten per cent water, and twenty per cent water, as I understood your testimony?

A. Yes. There is quite a variety.

Q. In all those three cases you found evidence of deterioration in six days?

A. I will have to consult the table.

Q. I am taking what you said: That is what you said, is it not? I am not going according to your table, I am going according to what you have just testified to.

A. I might not have had the table before me when I made that expression. I said three per cent of water, with no cereal, was mouldy in six days, yes.

Q. That is right. Go on.

A. I also added ten per cent water and no cereal, and ten per cent water and a variety of percentages of cereal.

Q. And that was six days?

A. Ten per cent cereal and ten per cent water, and five per cent cereal, was sour in six days.

Q. So they were all six days—

A. The difference between sour and mouldy.

Q. Evidence of deterioration appeared in six days?

A. Well, yes; you might say deterioration.

Q. So it was the same effect whether you used twenty per cent water, or ten per cent, or three per cent?

122 A. Providing you used a certain per cent of cereal with it.

Q. I am talking about water now: You got that result?

A. Yes, sir.

Q. What is the amount of natural moisture in meat?

A. It depends altogether on the percentage of fat in the meat. It varies with the fat.

Q. Take ordinary lean meat.

A. It will run from sixty-five to seventy-two per cent.

Q. What is the point at which moisture presents a favorable condition for bacterial action?

A. You will have to get the bacteriologist to answer that. I don't know.

Q. You are not able to testify as to that. You are not able to say, then, whether the added amount of water lessens the deterioration?

A. Not of meat itself. I know that dried meat does not deteriorate as rapidly as moist meat.

Q. But after you get to a certain point—

A. I don't know what the percentage is.

Q. —say twenty-five percent of moisture, does an increase in the moisture accelerate the deterioration? You do not know about that? A. No, I don't know about that.

Q. That is a matter of bacteriology? A. Yes, sir.

Q. So you do not know whether the added water, on account of the cereal, accelerates deterioration or not?

A. I know it accelerates fermentation in cereal, yes, sir.

123 Q. You know that? A. Yes, sir.

Q. How do you know it?

A. From practical experiments. I have tried taking cereal and adding various amounts of water, adding to it, and leave them exposed to the air, and found that the more water the earlier the deterioration.

#### Redirect Examination

By Mr. Woodward:

Q. Does the addition of cereal to sausage have any effect upon the digestive qualities of the product?

A. It lowers the digestive qualities of the sausage, if it is not thoroughly cooked, yes.

Q. Are there any authorities upon this subject, Mr. Price; that is, upon the subject of the addition of cereal and water to sausage?

A. Yes, a great many authorities.

Q. In substance, do some of those authorities hold in accordance with your experiments here? A. They do, yes, sir.

### Recross Examination

By Judge Ferriss:

Q. Are you familiar with this Ostertag's Handbook of Meat Inspection? A. Yes, sir.

Q. That is a recognized authority, is it not?

A. Yes, sir.

Q. It is approved by your Department in Washington?

A. Approved, did you say?

Q. Yes.

A. No, we don't approve anything, I don't think, along the literature line.

124 Q. You do not approve anything in your Department?

A. In the literature line.

Q. Who is Mr. John R. Mohler?

A. He is now Assistant Director Chief of the Bureau of Animal Industry.

Q. He wrote a preface to this book in which he says:

"The issuance of the present publication on meat inspection, so ably translated from the masterpiece on this subject, will be of untold benefit, not only to the practical meat inspector and practising veterinarian, but to the professor, student and layman as well. The need of such a book has long been felt by the English-reading inspectors:"

Does that amount to an approval of the book?

A. I should not say so.

Q. It would not? A. No, sir.

Q. I want to read you a paragraph from this book:

"Hygienic and culinary judgment of the addition of flour: Hofman rendered an opinion, in harmony with Schmidt-Mulheim and Schorer, that the addition of flour does not promote the decomposition of sausages; that sausage paste decomposes with equal rapidity whether with or without the addition of flour, and that, therefore, the assumption of a harmful effect from the addition of flour is unjustifiable, since the starch flour belongs to a class of bodies which decompose with difficulty. Finally, Hofmann calls attention to the fact that a slight addition of starch flour improves the quality of sausages:"

Q. What do you say to that?

A. I can read you an equally good work which differs quite a bit from that.

Q. Please give your attention to what I read you.

The Court: Q. What do you say about what he read?

A. I don't agree with that, and I don't think most authorities do.

Judge Ferriss: Q. Do you know anything about the  
125 process of finishing sausages, drying them?

A. No, sir.

Q. Do you know that in drying they lose a large amount of the moisture that is put in them?

A. My experiments have shown that they lose some in the finished product from the original amount they took, yes, sir.

Q. I will read you this and I would like to get your judgment on it. It is always interesting to see how high authorities disagree:

"The quantity of water which is added in the preparation of the meat mass varies. More water is added to good dry meat than to that of a watery character, since the latter possesses smaller powers of imbibition:"

How about that? A. I did not get the substance of that.

Q. I will read it again:

"The quantity of water which is added in the preparation of the meat mass varies. More water is added to good dry meat than to that of a watery character, since the latter possesses smaller powers of imbibition:"

Is that correct?

A. You might expect it would have some—

Q. Do you know whether they use water in the manufacture of sausages?

A. I have always heard that they do, when they add cereal to it they add water.

Q. When they do not add cereal do they use water?

A. I am not familiar. I am not a sausage maker.

Q. In your experiments did you use water?

A. I did, to see what the effect was.

Q. When you used no cereal? A. Yes, sir.

126 Q. Then you do know that water is proper to be used?

A. I know we did it.

Q. Do you not know it is the universal practice of sausage makers to add water for the purpose of reducing the mass to a proper consistency? A. I don't know.

Q. You do not know that? A. No, sir.

Q. I think you already said you do not know anything about the practical side of the business.

"Sausage makers determine the required amount of water for different qualities of meat, not according to the determined weights, but according to the feeling:"

Do you know anything about that? A. No, sir.

Q. "Water is added to the meat mass until it acquires the proper consistency according to the view of the sausage maker:"

Do you know anything about that?

A. No. That is a practical sausage proposition. I don't know.

Q. The inspector testified that that was a fact, that they used the water until they got it to a proper consistency.

"According to Hofmann, the amount of water added amounts to 24 per cent. However, the amount of water added is illusory, since the sausages lose water during smoking and drying, and are, therefore, sold with a considerably lower water content."

How about that?

A. I agree that the analysis will not show as high a degree of water, but the finished bulk does.

Q. "Hofmann found that the water content of sausages immediately after smoking was only 60.6 to 64.8 per cent. The sausage mass had, therefore, lost during the process of smoking not only the quantity which was added artificially, but also 10 to 15 per cent of the natural water of the meat:"

What do you say to that?

127 A. I say the analysis will show, probably, the lower content of water in the finished product than there is in the fresh meat itself, but the bulk itself is increased a great deal.

Q. I have been reading from page 774, and before I read from page 779. You say that this Mr. Mohler is in the Department now? A. Yes, sir.

Q. When he says that this is a valuable book, much needed and very useful, do you think he is wrong?

A. No, I don't say that. I say it has not got the approval of the Department. That means it has not the Secretary's approval. I don't consider his approval the approval of the Department.

Q. But as a scientific man would you think that it is of any value? A. I think it is a valuable book.



Q. You would not consider the opinion of Mr. Mohler worth as much as your own on that subject?

A. Not on sausage, no.

Q. Is Mr. Mohler your superior officer? A. Yes, sir.

#### Redirect Examination

By Mr. Woodward:

Q. The chemical analysis of meat to which cereal and water has been added will not show the true content of water?

A. It will show the true content of water of that product, but it won't show the true food value of the meat of the sausage.

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128 RALPH HOAGLAND, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, as follows:

#### Direct Examination

By Mr. Woodward:

Q. State your name. A. Ralph Hoagland.

Q. What is your occupation? A. Chemist.

Q. By whom are you employed?

A. By the United States Government.

Q. For how long have you been so employed?

A. I have been there about three years to the present period.

Q. Did you ever have occasion to make experiments as to the keeping quality of sausage made in various ways?

A. I made no experiments along that line.

Q. Did you ever make any experiments along the line showing the necessity of the addition of cereal or water in the manufacture of sausages?

A. We conducted quite an extensive series of experiments several years ago to determine the necessity for the use of cereal in different kinds of sausage, the effect of the use upon the quality of the sausage, and yield of sausage.

Q. Did you find that the use of cereal or water was necessary in the manufacture of sausage?

A. I think it is necessary to distinguish between the different kinds and classes of sausage that we experimented with, as it makes quite a difference. We conducted experiments with two general classes of sausage; one, frying

129 sausage, like pork and beef link sausage, and the other the cooked sausage, frankfurter and bologna, and I think it is necessary to separate the question as to the necessity for the use of water and necessity for cereal. They are separate propositions.

Q. Take up your experiments briefly and explain what you did, as well as the results you got, without going into unnecessary detail.

A. Taking it in the case of the fresh frying sausage like pork sausage, and pork and beef link sausage, we got the necessity for the use of cereal, in those classes of sausage, and we found that the use was not necessary at all.

We went into the necessity for the use of water in that sausage: We found it was not necessary to use water in that class of sausage. In the case of the cooked sausages, the frankfurter and bologna, (we made both kinds) we found that the use of water in certain quantities was necessary in order to produce a palatable product, but where excessive quantities were not used that the finished product usually did not contain any more water than the fresh meat. So that Government allows the use to that extent now.

Q. Did you find the use of cereal in that class of sausages necessary?

A. We found the use of cereal in that class of sausages was not necessary in frankfurter or bologna. We made two different grades of frankfurts, which they call a first grade and a second grade, and used in the second grade of sausage a cheaper class of meat.

Q. What class of meat did you use in making the second class sausage?

A. I don't remember all the details, because we conducted quite a different number of experiments, but we used tripe, and hearts and cheek meat, in the second kind of sausage.

Q. Did you find cereal necessary to use with that class of sausage?

A. Not in the experiments that we conducted.

Q. Did you find that the addition of cereal or water affected the flavor or tasting qualities, if we might call them such, of the sausage?

A. Well, now, so far as the use of cereal is concerned, the use of small quantities of cereal cannot be distinguished by the average person in eating a sausage especially in a frankfurter or bologna. With the use of excessive quantities, when you get to eight or ten per cent, you are very apt to detect it in the granular taste or feeling of the material in your mouth, and somewhat in appearance (the break in the sausage) but did not, in small quantities, either improve the quality or affect it as first, as far as my observation went, in the case of frankfurters; but in the case of the pork sausage it seemed better without the cereal than that which contained the cereal, a high grade of pork sausage—

Q. Who aided you in making your experiments?

A. In all the sausage we prepared we had it cooked in the usual manner in our laboratory, and examined by four or five different people, and a record made of the general opinion as to the quality.

Q. Did Mr. Viezens aid you in these experiments to which you referred?

A. Yes, Mr. Viezens aided us in the experiments to  
131 which I refer.

#### Cross-Examination

By Mr. Stratton:

Q. Mr. Hoagland, I understand you to say that you made some tests seven or eight years ago for the purpose of determining whether the use of cereal and water was necessary in sausage?

A. Yes, that was the purpose of it.

Q. Did you consider in that connection whether it was desirable, as well as necessary?

A. Well, we wanted to get the facts in the case, to know whether it was necessary in order to produce a marketable and palatable product.

Q. Your tests were laboratory tests?

A. No, made under packing house conditions.

Q. Are you an expert in the taste of products, as to what pleases the public and what does not please the public?

A. I have my own opinion as to the quality of sausage. I eat more or less sausage. I suppose my opinion is worth as much as the average person's who consumes sausage.

Q. Is it worth any more?

A. Not any more, I don't think.

Q. So your tests as to taste and otherwise which you made of this sausage were simply your own personal opinion as one who eats meat?

A. I said that there were three or four others who also sampled the sausage at the same time. It was not my personal opinion. It was conscientiously done.

132 Q. The experiment was confined to three or four?

A. As I remember it there were probably four or five of us altogether.

Q. You do not know what the public desires in that respect, do you? A. No, I cannot say.

Q. These experiments in which you used cereal and water, and in other cases in which you did not use cereal and water, was simply an impression of your own and the judgment of the three or four who were with you, as to whether it was palatable and wholesome, or not?

A. On the question of palatability, yes.

Q. Do you not know, Mr. Hoagland, that the presence of cereal in pork sausage would retain the grease in the sausage as it was frying in the pan and thus make it more palatable in that respect?

A. Well, I suppose it may. I don't know whether it will make it more palatable or not. I never made any particular observation of that.

Q. If you fry pure pork sausage most of the grease would run away?

A. Naturally, part of the grease will fry out. The fatter it is the more the grease will fry out.

Q. The presence of the cereal in the pork sausage would retain that grease so that the person who ate it would get the benefit of the grease? A. Yes, sir.

Q. - And that is part of the palatability of good sausage?

A. I don't know. I don't care so much for grease myself. I think the palatability is more in favor of the leaner of the two.

Q. You do not profess to know anything about what the public desires in the way of cereal in sausage, do you?

A. I don't know. I don't think the public knows.

Q. You can taste the corn flour slightly in the sausage if five or eight per cent is used, can you not?

A. In our experiments, where they used up to five, eight or ten per cent cereal it was noticeable.

Q. That was a very palatable and attractive taste, was it not? A. No, it was not.

Q. What was the trouble with it?

A. I did not care for partially cooked corn flour mixed in with meat, myself.

Q. Do you think it effects deleteriously or objectionably the taste of the product? A. I certainly do.

Q. In other words, the presence of corn flour mixed with fat of beef or pork would produce an unpalatable product?

A. I think if you used it in excessive quantities, yes.

Q. What do you mean by "excessive quantities?"

A. Well, up to eight or ten per cent of cereal.

Q. Why do you call it excessive, where do you get that definition of excessive?

A. That is only a relative term, of course. Large quantities, you might say.

Q. Once or twice during your testimony you referred to the "excessive quantities" of cereal.

A. I will say large quantities.

Q. You mean large quantities. That is all.

134 PAUL VIEZENS, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, as follows:

Direct Examination

By Mr. Woodward:

Q. State your name. A. Paul Viezens.

Q. And your age? A. Fifty-nine.

Q. Are you familiar with the method and manner of making sausages? A. Yes, sir.

Q. When did you first start in that business, Mr. Viezens?

A. In '72.

Q. State briefly what concern, and so forth, you have worked for as a practical sausage manufacturer?

A. I started in '72 working for butchers that done killing and making sausages and curing them; at different places, different firms. In '77, in the spring, I started for Armour & Company in the same capacity, in markets, and in making sausage.

Q. How long did you continue with Armour & Company?

A. Until 1905.

Q. When you first became familiar with the industry of manufacturing sausages was it customary to use cereal and water in the manufacture of those sausages? A. No, sir.

Q. When did you first learn of the practice of using cereal and water in the manufacture of sausages?

A. 1887 or 1888. I don't know which, around that time.

Q. Some ten years after you went with Armour & Company? A. Yes, sir.

135 Q. Is it necessary, in your opinion, to use cereal or water in the manufacture of sausages?

Judge Ferriss: I object to that question. We are not claiming it is absolutely necessary. I think the question is misleading.

The Court: Ask him what effect it will have upon the sausage to add cereal and water in the manufacture of it.

Judge Ferriss: Let him state the facts.

Mr. Woodward: Q. State, Mr. Vienzens—

A. It all depends on what kind of sausage you are going to make. Any cooked sausage would have to have additional water to make it palatable. In the frying sausage it is not necessary to add water.

Q. You only add water, then, in the so-called smoked or cooked sausage? A. Yes, cooked sausage.

Q. What effect does the addition of cereal to the chopped meat have in the manufacture of sausage?

A. Well, it is an absorber. It absorbs additional water if you put it in.

Q. How much water will it absorb, Mr. Viezens?

A. A pound of cereal will absorb from a pound to a pound and a half of water. It does not keep it all; in smoking you lose part of it, and in cooking. The meat gets away with it.

Q. Does it lose all of the added water— A. No, sir.

Q. —where cereal is present? A. No, sir.

Q. In what amounts have you used cereal in sausage, Mr. Viezens?

136 A. I have never went to extremes. I have used from two to five per cent. I confined myself to five per cent except in some cases where the competition was very keen, we perhaps used eight. I never used over that.

The Court: Q. Why do you say where the competition was keen you used eight per cent?

A. Sometimes we have had to match a certain price in order to compete with the competitors.

Q. You would put in the cereal and water to offset the price of meat, is that it? A. Yes, sir.

Q. You give us cereal and water and call it sausage, is that it? A. At that time we did, yes, sir.

Mr. Woodward: Q. Approximately, what was the cost of the cereal you used in the manufacture of the sausage?

A. The cost?

Q. Yes.

A. From  $2\frac{1}{4}$ ; the last price I know was .0275 a hundred, or a pound;  $2\frac{3}{4}$  cents a pound.

The Court: Q. What would meat be worth at that same time?

A. All the way from five to eight cents.

Mr. Woodward: Q. How much difference was made in the selling price of the two different kinds of product, that is, the sausage without cereal and the sausage with cereal and water?

A. I couldn't answer that. These prices were made in a special department. I never made prices on the sausage.

The Court: Q. If the competition were to become greater you would use more cereal and more water to meet the competition, is that it?

137 A. Well, at times we had to do it.

Mr. Woodward: Q. In purchasing cereal for use in the manufacture of sausage what was it desirable to obtain, what quality in the cereal was it desirable to obtain?

Judge Ferriss: Ask him what he did obtain.

A. I have bought it and I tested mostly all we received there on the quality of absorbent moisture. Some would absorb more than others.

Q. Did you purchase that which absorbed more moisture?

A. I did not purchase it, but I recommended it.

Q. That was the cereal that was purchased?

A. As a rule it was, yes, sir.

Q. As a practical sausage manufacturer, tell us whether or not you could make sausage from cheeks and hearts, and what is known as the lower grade of meat, without the addition of any cereal as a binder?

A. I cannot, nor nobody can make a sausage out of hearts only. It has to be a composition of the different meats, different grades. Neither could you make a sausage out of all tripe. That is an impossibility, no matter how much cereal you would use. It would not manufacture. But I can take cheap grades and take a portion of beef cuts, or beef trimmings, and have to have no cereal to make any sausage out of.

Q. Even though you used hearts and cheeks with that beef? A. Yes, sir.

Q. Mr. Viezens, what first caused, if you know, the use of cereal in the manufacture of sausage?

138 Judge Ferriss: Q. If you know?

Mr. Woodward: In other words, why did you add cereal to your sausage in manufacturing it?

Judge Ferriss: That is objected to. It does not make any difference why he did it.

The Court: The objection is sustained.

Mr. Woodward: Q. Are you familiar with the keeping qualities of sausage without cereal and water added, and sausage with cereal and water added? A. Somewhat, yes, sir.

Q. Will sausage with cereal and water added keep as long as that which has no cereal and water in its composition?

A. No, sir.

The Court: Q. It will not?

A. It will not, sir.

Mr. Woodward: Q. Approximately what is the difference, Mr. Viezens?

A. The moisture with cereal will start a fermentation quicker than without cereal and water, unless they are kept in a freezer or cold storage they may keep a little longer.

# Cross-Examination

By Judge Ferriss:

Q. Do I understand you to say that you are in the sausage business now for yourself?

A. Not now, no, sir.

Q. You are not in the sausage business?

A. Not just now.

Q. How long since you have been in the sausage business?

A. I have quit in 1905.

Q. 1895? A. 1905.

Q. 1905? A. Yes, sir.

139 Q. What are you doing now?

A. I am with the Government at present.

Q. You are a Government inspector?

A. Yes, sir.

Q. Did you quit the sausage business to become a Government inspector? A. No, sir.

Q. But you had quit anyway?

A. I had quit, yes, sir.

Q. What were you doing when you were appointed inspector? A. Well, I was traveling for a while.

The Court: Q. How long have you been an inspector?

A. Since 1906.

Judge Ferriss: Q. You became an inspector when the law was passed?

A. In the fall. I came in with the second addition. This was in September, I believe.

Q. Where have you been inspecting? A. In Chicago.

Q. Whereabouts have you been employed by the Government, whereabouts are you stationed? A. In Chicago.

Q. I understand you went with Armour & Company in 1878? A. No, I went there in '77.

Q. You stayed with Armour & Company how long?

A. Until 1905, except one year I was sent up to Milwaukee.

Q. You were with Armour & Company until you quit the sausage business? A. Yes, sir.

Q. What were you doing while with Armour & Company?

A. I was employed in the sausage department, and in '86



I became—

140 Q. In what capacity?

A. When I was a young man, in 1886, I became foreman and superintendent of that department until I quit.

Q. From 1886 until you quit you were—

A. I had charge of the department.

Q. Is it not a fact, Mr. Vicens, that the sausage business has increased very largely in late years as compared to what it was when you began? Has not the consumption of sausages increased very largely?

The Court: Q. Do more people eat it?

A. It might be, but my highest mark was reached when I was with Armour, as far as the Chicago firm was concerned. I don't know what they do elsewhere.

Q. By Judge Ferriss: Sausages are generally used as an of food, are they not— A. Yes, sir.

Q. —by all classes of people? A. Yes, sir.

Q. And as the trade progressed there developed a demand for a cheaper sausage?

A. There was always a cheap grade made.

Q. There was always a demand for cheap sausage?

A. Yes, sir.

Q. And the use of cereal and water tended to cheapen the product, did it not? A. It does.

Q. You were always up against local competition in Chicago, were you not? A. Yes, sir.

Q. You had to meet that competition? A. We did.

Q. That competition was not inspected?

141 A. At that time we had no inspection.

Q. That is very true: There was no inspection at that time? A. No, sir.

Q. How has it been since, are not the packers in Chicago now in competition with local butchers?

A. They are with local manufacturers, right along.

Q. The local manufacturers are not under Government inspection? A. No; I am sorry to say.

Q. You say the use of cereal began in 1888?

A. I am not quite sure; either in 1887 or 1888.

Q. You mean in your personal experience?

A. I mean in my personal experience.

Q. You don't know how long it had been used generally?

A. I have never heard of any before being used.

Q. You never did? A. No.

Q. Did you ever hear of its being used in Germany?

A. Potato flour was used. We used it also before that time I stated, but potato flour is not a cereal.

Q. I understand, but that was used in the manufacture?

A. Here and there we used a couple of bags just to satisfy those dealers. We paid 5½ cents a pound for it. It was more than the meat was worth.

Q. The value of cereal in the manufacture of sausage depends somewhat upon the character of the meat, does it not?

A. Oh, I don't think it is necessary to have cereal.

Q. It has a binding quality?

A. All meats have, with very few exceptions.

142 Q. Has cereal a binding quality?

A. In some I think it has.

Q. Then it would be more useful in material of lower binding quality than it would in a meat that had a binding quality of its own, would it not?

A. Frying sausage, you use it raw, it does not act as a binder whatever. It is simply a filler.

Q. I do not think you understand: In making sausage out of shorts does that not need a binder more than bull beef?

A. I don't know of any short meat except it is sour meat.

Q. When you talk about "short meats" what does that mean?

A. I do not know of any short meats.

Q. You do not know what that term means?

A. No. I know if any chopped meats get sour over night, or in two or three nights, to get short, then it begins to get sour.

Q. I am not talking about it in that sense, but about trimmings, hearts, snouts, ears, and things of that kind: Do they have the same binding quality in themselves that bull beef has?

A. No, sir; bull meat has about the most binding qualities there is.

Q. When you make sausage out of bull beef you would not need any extra binder?

A. No, you would not.

Q. If you used these other trimmings and things, would not a binder of some kind be necessary?

143 A. Beef trimmings have enough of binder. It is not necessary with that unless you use all hearts.

Q. I don't say necessary in the sense that you can not make sausage without it. Does it improve the binding quality of sausage made out of those meats to use cereal?

A. I don't think so.

Q. You do not think that in any case cereal acts as a binder?

A. I don't think it is necessary.

Q. You do not think it acts as a binder in any case?

A. It may help with the binding, but those meats—

Q. You say it is an absorbent? A. Yes, sir.

Q. It absorbs water? A. Yes, sir.

Q. And fat, too? A. It does.

Q. Used with pure pork sausage would it not assist the cooking and tasting qualities of the sausage?

A. The Government has provided for that and allows them two per cent.

Q. I do not care about that. I am asking you to answer my question, if you please: Would it not improve the cooking and tasting qualities— A. No, sir.

Q. —of pure pork sausage? A. No, sir.

Q. It would not? A. No, sir.

Q. What proportion of the water that is put into sausage is lost in the process of curing, smoking and cooking?

A. You can smoke it all out and you can leave considerable in there. That depends on how hot you get your fire, and how long you leave it in there.

144 Q. Take it on the average: You said yourself here a few moments ago that some of the water was lost.

A. Yes, sir.

Q. Generally speaking, what percentage of the water that has been put in is lost in the final product?

A. You might lose ten to fifteen per cent.

Q. You might lose ten to fifteen per cent? A. Yes, sir.

Q. Did I not understand you to say that when you use shorts that some binder is necessary, not necessarily cereal, but do you not have to use some other cuts with it?

A. You don't have to use it.

Q. Then I misunderstood you. You said that sausage with cereal will not keep as well as sausage without it?

A. Yes, I said that.

Q. How long will sausage without cereal keep?

A. It depends on the temperature and the conditions.

Q. Take the ordinary average conditions: What would you say fresh—

A. And it depends how much water has been added.

Q. How long would you say that the average sausage would keep in good condition before it is eaten, after it is made, in ordinary temperature?

A. Would you name the kind of sausage you would want me to answer on that?

Q. Take bologna.

A. All right: An ordinary temperature?

Q. Yes. A. Oh, six to ten days.

Q. How many days? A. Six to ten days.

145 Q. Ten days? A. Yes, sir.

Q. If you put cereal in it how much less time will it keep? A. It won't keep as long.

Q. How long will it keep with cereal in it? Have you ever made any test to see?

A. Well, I have made tests, yes, sir.

Q. Well, I want your judgment on it. You have said that it does not keep so long: What is the difference?

A. If you box the bologna up—

Q. Will it keep a week?

A. It keeps a week, and keeps two weeks; it might keep a month, if you keep it in the right temperature. If you keep it where the air strikes it, or the action of the weather dries out, it keeps longer—

Q. Take the temperature in which you say bologna without cereal will keep ten days. A. Yes, sir.

Q. How long will it keep with cereal in that same temperature?

A. I would say about four or five days you could get along.

Q. Do you mean to say there is a difference of four or five days in the keeping quality? A. Oh, yes; easy.

Q. Have you ever made any experiments to prove that, or is that just your opinion?

A. No, we have often run in cases where stuff had been packed up and come back in two days and was sour. I say it all depends on the conditions and on the temperature.

Q. It is very hard to make any comparison, is it not?

A. Oh, no, it is not hard to make it. If you use cereal  
146 and water—

Q. In one temperature sausage with cereal will keep longer than it will without cereal in another temperature, will it not? A. I did not catch that.

Q. I say, sausage with cereal might keep in a certain temperature longer than sausage without cereal would keep in a warmer temperature: Is not that true?

A. I haven't tried that; it may.

Q. What is that? A. I haven't tried it.

Q. You have not tried it. That is what I supposed. What time, on the average, is there between the manufacture of sausage and its consumption? After it is out of the refrigerator how long is it kept by the retail butcher, on the average?

A. Some of them keep it a day, and some of them keep it one and two weeks.

Q. What is the ordinary practice with the butchers in St. Louis, or in Chicago, in getting their supplies from the packer?

A. They order today and they get it tomorrow.

Q. Do they not get daily supplies? A. Sir?

Q. Do they not get daily supplies?

A. Oh, yes, they can.

Q. Is not that on the theory that it is consumed daily?

A. Supposed to be.

Q. Would it not be an exceptional case when fresh sausage was kept a week after it is out of the refrigerator?

147 A. Well, the consumer, the dealer often gets stuck on some. It stays on the counter.

Q. Can you explain that the dealer would be willing to sell spoiled sausage?

The Court: (To the witness) You need not answer that question.

The Witness: I am not going to.

At this point adjournment was had to Saturday, January 29, 1916, at ten o'clock in the forenoon.

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Saint Louis, January 29, 1916.

Met pursuant to adjournment as above on Saturday, January 29, 1916, at ten o'clock in the forenoon:

Present: Same parties as heretofore.

The following proceedings were had:

Mr. Woodward: May it please the Court, at this point I would like to introduce the exhibits which were marked for identification, identified by the witness Price upon yesterday as being the result, containing the tabulated result, of his experiments in the manufacture of sausage with and without cereal.

The documents last referred to are accordingly marked "Defendant's Exhibit A"; and are in the words and figures as follows, to-wit:

No.	State of Preparation	% H <sub>2</sub> O	% Cereal	Material for 100 lb. mix.			Cost of 100 lb.	
				Meat	H <sub>2</sub> O	Cereal	Meat	C
1	Fresh	0	0	100			\$11.22	
2	Smoked	0	0	100			11.22	
3	Cooked	0	0	100			11.22	
4	Fresh	3	0	97	3		10.88	
5	Smoked	3	0	97	3		10.88	
6	Cooked	3	0	97	3		10.88	
7	Fresh	3	2	95	3	2	10.659	
8	Smoked	3	2	95	3	2	10.659	
9	Cooked	3	2	95	3	2	10.659	
10	Fresh	0	2	98		2	10.995	
11	Smoked	0	2	98		2	10.995	
12	Cooked	0	2	98		2	10.995	
13	Fresh	10	0	90	10		10.098	
14	Smoked	10	0	90	10		10.098	
15	Cooked	10	0	90	10		10.098	
16	Fresh	10	2	88	10	2	9.873	
17	Smoked	10	2	88	10	2	9.873	
18	Cooked	10	2	88	10	2	9.873	
19	Fresh	0	5	95		5	10.659	
20	Smoked	0	5	95		5	10.659	
21	Cooked	0	5	95		5	10.659	
22	Fresh	3	5	92	3	5	10.322	
23	Smoked	3	5	92	3	5	10.322	
24	Cooked	3	5	92	3	5	10.322	
25	Fresh	10	5	85	10	5	9.537	
26	Smoked	10	5	85	10	5	9.537	
27	Cooked	10	5	85	10	5	9.537	
28	Fresh	20	5	75	20	5	8.415	
29	Smoked	20	5	75	20	5	8.415	
30	Cooked	20	5	75	20	5	8.415	
31	Fresh	20	10	70	20	10	7.854	
32	Smoked	20	10	70	20	10	7.854	
33	Cooked	20	10	70	20	10	7.854	

Value of sausage calculated as original value of meat used na

ix.	Weight of Sau. & Value (market) (Labor not included)		Difference between finished sausage & (meat and cereal) on 100 lb. mixed	M-Moldy S-Sour R-Rancid P-Putrid
	Finished Wt.	Value		
	100	\$11 22	\$	M-10 P-13
	92 36	10 36	- 86	
	91 66	10 28	- 94	
	100	11 22	34	M-6 P-13
	92 52	10 38	- 50	
	91 90	10 31	- 57	
	100	11 22	50	M-10 P-10
	94 59	10 61	- 10	M-13
	93 66	10 50	- 22	
	100	11 22	17	M. S. 10 P-13
	94 56	10 60	- 45	M. S. 13
	92 94	10 42	- 63	
	100	11 22	1 13	M. S. 10 P-13
	93 92	10 53	44	S-13
	92 05	10 32	23	
	100	11 22	1 29	M-6? S. P. 10
	93 71	10 51	58	S-10 M-13
	92 72	10 40	47	
	100	11 22	42	M. P. -13
	93 57	10 50	- 30	M. S. -13
	93 57	10 50	- 30	M-13
	100	11 22	75	M-10 P-13
	93 63	10 50	03	
	93 71	10 51	04	
	100	11 22	1 54	M. S. -10
	94 04	10 54	86	M. S. -13
	93 8	10 52	84	
	100	11 22	2 66	M-6 P-10
	92 76	10 40	1 84	M. S. -13
	92 63	10 38	1 82	M-13 S-?
	100	11 22	3 07	M-6 P-10
	93 71	10 51	2 36	S-10
	94 33	10 58	2 43	M-10

nely: \$ .1122 per lb. No cost of labor operation included.

No	Stage of preparation.	$\frac{C_c}{\text{water}}$	$\frac{C_c}{\text{cereal}}$	weight	Weight after smoking	$\frac{C_c}{\text{loss}}$	Weight after cooking	$\frac{C_c}{\text{loss}}$	Weight after 2 days	$\frac{C_c}{\text{loss}}$
1	Fresh	0	0	60.0					59.0	
2	Smoked	0	0	78.5	72.5	7.64			71.0	
3	Cooked	0	0	54.0	50.0	7.11	49.5	8.34	48.5	
4	Fresh	3	0	79.0					78.0	
5	Smoked	3	0	73.5	68.0	7.48			66	
6	Cooked	3	0	74.0	67.5	8.28	68.0	8.1	66.5	
7	Fresh	3	2	69.5					68.5	
8	Smoked	3	2	74.0	70.0	5.41			68.0	
9	Cooked	3	2	71.0	67.0	5.63	66.5	6.34	65.0	
10	Fresh	0	2	78.5					78.0	
11	Smoked	0	2	73.5	69.5	5.44			68.0	
12	Cooked	0	2	78.0	72.5	5.77	72.5	7.05	71.5	
13	Fresh	10	0	72.5					71.0	
14	Smoked	10	0	74.0	69.5	6.08			67.5	
15	Cooked	10	0	75.5	69.5	7.95	69.5	7.95	68.0	
16	Fresh	10	2	76.5					75.25	
17	Smoked	10	2	79.5	74.5	6.29			72.5	
18	Cooked	10	2	75.5	70.0	7.29	70	7.28	68.5	
19	Fresh	0	5	76.5					75.5	
20	Smoked	0	5	78.0	79.0?	?			77.0	
21	Cooked	0	5	70.0	65.5	6.43	65.5	6.43	61.0	
22	Fresh	3	5	79.0					78.0	
23	Smoked	3	5	78.5	73.5	6.37			72.0	
24	Cooked	3	5	79.5	74.5	6.29	74.5	6.29	72.5	
25	Fresh	10	5	79.0					77.5	
26	Smoked	10	5	75.5	71.0	5.96			69.0	
27	Cooked	10	5	56.5	56.0	0.9	53.0	6.2	51.5	
28	Fresh	20	5	59.5					58.5	
29	Smoked	20	5	76.0	70.5	7.24			68.0	
30	Cooked	20	5	78.0	72.5	70.5	72.25	7.37	70.5	
31	Fresh	20	10	79.5					77.5	
32	Smoked	20	10	79.5	74.5	6.29			72.5	
33	Cooked	20	10	70.5	66.5	5.68	66.5	5.67	64.5	

Weights given in ounces. Col. A gives  $\frac{C_c}{\text{loss}}$  from state in preparation



14-B

Weight after 3 days	$C_L$ loss	Weight after 6 days	$C_L$ loss	Weight after 10 days	$C_L$ loss	Weight after 13 days	$C_L$ loss	Total A% loss	Total B% loss	M-Moldy S-Sour R-Rancid P-Putrid
59.0		58.0		57.5		57.0		5.0	5.0	M-10 P-13
71.0		67.0		66.5		65.0		10.35	15.9	
48.5		48.0		47.5		47.0		5.05	12.95	
78.0		77.0		76.0		75.5		4.43	4.43	M-6 P-13
66.0		65.0		64.5		64.0		5.89	12.95	
66.5		65.5		65.0		64.5		5.14	12.85	
68.0		67.0		66.5				4.32	4.32	M-10 P-10
68.0		67.0		66.5		65.5		6.43	11.5	M-13
65.0		64.5		64.0		63.5		4.51	9.16	
78.0		77.0		76.5		76.0		3.19	3.19	MS-10 P-13
68.0		67.0		66.0		65.5		5.75	10.9	MS-13
71.5		70.5		70.0		70.0		3.45	10.25	
71.0		69.5		68.5		67.5		6.9	6.9	MS-10 P-13
67.5		66.75		66.0		65.5		5.75	11.5	S-13
68.0		67.0		67.0		66.0		5.01	12.65	
75.0		73.5		72.25				5.62	5.62	M-6? SP-10
72.5		71.5		71.5		70.5		5.37	11.3	S-10 M-13
68.5		67.5		67.0		66.0		5.71	11.9	
75.0		74		73.5		73.0		4.58	4.58	MP-13
77.0		76		75.0		74.5		?	4.48?	MS-13
64.0		63.25		62.5		60.0		8.4	14.3	R-13
78.0		77.0		76.0		75.5		5.7	5.7	M-10 P-13
72		71.5		71.0		70.5		4.08	10.2	
72.5		72.0		71.5		71.0		4.7	10.7	
77.0		76.0		75.0				5.06	5.06	MS-10
69.0		68.5		68.0		67.5		4.93	10.65	MS-13
51.5		51.0		50.5		50.0		5.66	11.5	
58.0		57.0		56.5				5.5	5.5	M-6 P-10
68.0		67.0		66.5		65.0		7.8	14.5	MS-13
70.5		70.0		69.0		68.5		5.14	12.15	M-13 S-?
77.5		76.5		75.5				5.03	5.03	M-6 P-10
72.5		71.5		71.0		70.5		5.37	11.30	S-10
64.5		63.75		63.5		62.5		6.01	11.35	M-10

Col. B gives % loss from fresh condition just after stuffing.

151 Mr. Woodward: If the Court please, we have the depositions of two witnesses, which were taken at a prior time, and we ask that they may be put into the record. It is cumulative, and unless the Court desires it I will not take the time to read them now.

The Court: Cumulative upon what subject?

Mr. Woodward: Upon the subject that the use of cereal is not necessary in the manufacture of sausage. I will read the depositions if your Honor desires.

The Court: Let them go in.

Mr. Woodward: That is agreeable, Judge Ferriss, that those may be a part of the record?

Judge Ferriss: Yes.

The depositions last referred to, being the depositions of George A. Holman and Christian Grozinger, are in the words and figures, as follows, to-wit:

152 District Court of the United States in and for The  
Eastern Division of the Eastern Judicial District of Missouri.

St. Louis Independent Packing Company, Plaintiff,  
No. 4156. vs.

Hon. David F. Houston, Sec. of Agriculture, et al., Defendants.

Depositions of George A. Holman and Christian Grozinger, taken by consent of the parties before Mildred J. Cook, a Notary Public within and for the City of St. Louis, State of Missouri, to be used on behalf of the defendants in the case of St. Louis Independent Packing Company, Plaintiff, vs. Hon. David F. Houston, Sec. of Agriculture, et al., Defendants, pending in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri; said depositions being taken on Friday, December 17, 1915, at the hour of ten-thirty o'clock in the forenoon, in the office of the United States District Attorney, Custom House Building, Eighth and Locust Streets, in the City of St. Louis, Missouri.

Appearances:

Judge Franklin Ferriss, on behalf of the Plaintiff.

Mr. W. H. Woodward, on behalf of the Defendants.

154 It Is Agreed between counsel that all exceptions as to time and notice are waived, and that these depositions

may be taken in shorthand before Mildred J. Cook, Notary Public, and read and used with the same force and effect as if taken under regular notice before a regularly appointed commissioner.

GEORGE A. HOHMAN, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendants, as follows:

### Direct Examination

By Mr. Woodward:

Q. Please state your name. A. George A. Hohman.

Q. Where do you live, Mr. Hohman? A. Baltimore.

Q. What is your occupation?

A. Packers and sausage makers.

Q. How long have you been so engaged, Mr. Hohman?

A. About thirty-five years.

Q. During that time have you been continuously engaged in the business of making sausage? A. Yes, sir.

Q. I will ask you to define sausage, what is it?

Judge Ferriss: I object to that question. It is not for the witness to give the definition of sausage. He may state what the ingredients are, if he sees fit, as he understands it.

A. Sausages are minced wholesome meat.

155 Mr. Woodward: Q. How do you make sausage?

A. Through the regular process of mincing and mixing.

Q. Is anything added to meat to make sausage?

A. Not necessarily.

Q. Does sausage as usually made contain spices, Mr. Hohman? A. Yes, sir.

Q. Is it necessary in the manufacture of sausage to use cereals? A. Positively not.

Q. Do you now refer to all grades and classes of sausage?

A. All kinds and classes.

Q. In the conduct of your business, Mr. Hohman, do you carry on an interstate trade, or ship sausage in interstate commerce?

A. Not particularly, no, sir. All we ship is intrastate, not interstate.

Q. Is your plant operated under the inspection of the Bureau of Animal Industry of the Department of Agriculture?

A. Yes, sir.

Q. Does a pure sausage, as you understand the word, Mr. Hohman, contain any cereal of any kind?

A. Pure sausage contains no cereal.

Q. For what purpose, if you know, is cereal used in the manufacture of sausage?

Judge Ferriss: Q. Do you know? A. Yes, sir.

Judge Ferriss: Go ahead.

The Witness: Cereal may be used as a profitable basis for shrinkage.

Mr. Woodward: Q. What do you mean by that?

156 A. That any sausage containing cereal will lose less in smoking and transportation than pure sausage.

Q. You mean will lose less in weight?

A. I mean will lose less in weight.

Q. Is the use of cereal necessary as a binder in the manufacture of sausage? A. I don't think so.

Q. Can sausage be made without the use of cereal?

A. Yes, sir.

Q. Does your answer also apply to sausage made from the lower or cheaper cuts of meat? A. Yes, sir.

Q. Are you familiar with the value of sausages, Mr. Hohman? A. Well, I just don't understand that.

Q. The price at which they are sold? A. Oh, yes.

Q. How much cheaper does a sausage containing cereal sell for than a sausage which contains no cereal?

A. That depends upon the reputation of the man handling the goods. A man may use cereal and get just as much money for them as a man that does not use any cereal, but in my estimation, a sausage with cereal is not worth as much money, within two cents a pound, as pure sausage.

#### Cross-Examination

By Judge Ferriss:

Q. Where did you say your place of business is?

A. Baltimore.

Q. How long have you done business there?

A. About thirty-five years.

Q. You have a regular packing establishment?

A. Yes, sir.

157 Q. What does your business in sausages amount to a year, in pounds?

A. In pounds? Well, we are averaging about three and one-half tons per week, no, about twenty tons of sausage per week.

- Q. What kinds of sausage do you make?  
A. All kinds, fresh pork sausage—  
Q. Name them.  
A. Frankfurters, bologna, garlic bologna, ham bologna, large beef bologna, liver pudding, head cheese.  
Q. You say you never used cereal?  
A. I beg pardon? Oh, yes, I have used cereal.  
Q. Up until when did you use it?  
A. We used cereal up until April, 1912.  
Q. Why did you quit using it?  
A. It was found—it was not used because the Government did not permit us to use it.  
Q. You quit because the Government forbade it?  
A. Yes, sir.  
Q. How long had you been using it up to that time?  
A. I suppose about eight or nine years.  
Q. What kind of cereal did you use?  
A. I suppose it was wheat, corn, flour.  
Q. Did you use potato flour?  
A. No, sir, we never used potato flour.  
Q. What kind of cattle did you kill?  
A. You mean as to—generally, we killed bulls.  
Q. Altogether bulls? A. Altogether.  
158 Q. Is it not a fact that bull beef does not need a binder as much as other animals? A. That is true.  
Q. That is true, is it not? A. Yes, sir.  
Q. It is a fact that you can make sausage without cereal by using bull beef better than you can the general run of cattle? A. Yes, sir.  
Q. Is it not true, also, that there is a difference in the different cuts as to their binding qualities? A. Yes, sir.  
Q. There are some portions of meat that are called "short," are there not? A. Yes, sir.  
Q. Short meat: What are they?  
A. Generally, the hind quarters of cattle.  
Q. You have always done an honest business, I suppose?  
A. Yes, sir.  
Q. And you found you could make sausage with cereal cheaper than you could without it? A. Yes, sir.  
Q. I suppose you gave your trade the benefit of that difference?  
A. We never was able to get any more money for them after we quit using them.  
Q. What is that?  
A. We never was able to get any more money for them after we quit using them.

Q. That is not the question I asked you: Did you give the trade the benefit of the cheaper method of manufacture?

A. Yes, sir.

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159 CHRISTIAN GROZINGER, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendants, as follows:

Direct Examination

By Mr. Woodward:

Q. Where do you live? A. In Brooklyn, New York.

Q. How old are you? A. Forty-seven.

Q. What is your occupation?

A. Sausage maker and curer.

Q. How long have you been so engaged?

A. Eighteen years.

Q. How do you make sausages in your establishment, Mr. Grozinger?

A. Out of beef; bologna out of bull beef and pork; frankfurt sausage out of pork.

Q. Do you use cereal in the manufacture of your sausage? A. No, sir.

Q. Is the use of cereal necessary as a binder in the manufacture of sausage? A. No, sir.

Q. Would that answer apply equally to sausage made from the cheaper or inferior cuts of meat?

A. I haven't used any inferior meat; I don't know. All I use is bull beef.

Q. Is your plant operated under the inspection service of the Bureau of Animal Industry of the Department of Agriculture? A. Yes, sir.

Q. Do you ship sausage in interstate commerce?

A. Occasionally; very little.

160 Q. Have you ever had occasion to observe the keeping qualities of a sausage manufactured with cereal and a sausage manufactured without the addition of any cereal? A. Yes, sir.

Q. What is the difference in the keeping qualities?

A. The keeping quality with cereal added won't keep as well as the pure sausage, unless it is kept in a very cold degree, in freezing degree.

Q. What would you say, Mr. Gronzinger, a finished sausage product consists of?

A. In what way, with cereal added, or what?

Q. What is your interpretation of what a finished sausage product is, what is it?

Judge Ferris: I object to that. He can tell what he puts in sausages. I have no objection to that. As far as the general definition is concerned, I don't think he is competent.

A. A finished sausage is made out of meat only and added with the necessary moisture with spices.

Mr. Woodward: Q. Did you ever use cereal in your establishment, Mr. Grozinger? A. Yes, sir.

Q. In what amounts?

A. Well, just two or three per cent.

Q. Two or three per cent? A. Yes, sir.

Q. When did you discontinue the use of cereal in the manufacture of your sausages?

A. Oh, somewhere about five or six years ago.

Q. Was that before the regulation forbidding its use went into effect? A. Yes. We discontinued it then.

Q. Then or before?

161 A. Just then when the order came out.

#### Cross-Examination

By Judge Ferriss:

Q. How long have you done business in Brooklyn?

A. I have done a big business in Brooklyn twenty-two years.

Q. What were you doing before you began making sausages?

A. I had a beef shop, beef business, a retail meat market.

Q. A meat market? A. Yes, sir.

Q. Did you kill your own meat? A. No, sir.

Q. Were you a retail butcher?

A. I was a retail butcher.

Q. When did you begin making sausages? You have stated, but I have forgotten.

A. I did make sausages at the retail market then in small quantities, but on a large scale I started in about eighteen years ago.

Q. How large an establishment have you; how much sausage do you make during the year?

A. We make now from four to five thousand pounds a day.

Q. That is the average, is it? A. Yes, sir.

Q. You make summer sausage? A. No.

Q. You make only fresh sausage?

A. Fresh sausage and smoked sausage.

Q. You make smoked sausage? A. Yes, sir.

Q. Is not that a summer sausage?

A. No, sir, it is sold daily; that is, it keeps for a week.  
162 We never keep it—

Q. Your business, then, is practically confined to what is called fresh sausage? A. Fresh sausage.

Q. What kinds of meat do you use in that?

A. For the smoked sausage we use bull beef and pork.

Q. And for the fresh, the other sausage?

A. Pork only.

Q. The only beef you use is bull beef? A. Bull beef.

Q. Why do you limit yourself to bull beef?

A. That makes the best kind of sausage.

Q. Bull beef does not require anything in the way of a binder, as much as other meat? A. No, sir.

Q. You said that sausage with cereal did not keep as well as it does without it?

A. No, sir, it don't keep as well.

Q. What is the difference?

A. As soon as the sausage is laying, in warm weather, it sours.

Q. How long will fresh pork sausage keep in warm weather? I mean, if it is not cooled.

A. Fresh pork sausage won't keep any length of time in warm weather, but has to be kept cold, fresh pork, but smoked sausage is different.

Q. How long will smoked sausage keep?

A. Pure smoked sausage you can keep a week or longer.

Q. Pure smoked sausage you can keep a week or longer?

A. Yes, sir.

Q. Does that have to be kept cold?

A. No, sir, not exactly; it can be kept in a regular temperature.

163 Q. When you used a pure cereal would not your fresh sausage keep a week, if it was properly cooled?

A. With cereal?

Q. Yes.

A. It would not, no; in freezing temperature it might keep, but anything warmer than that it would not keep for a week.

Q. Probably?

A. It would not keep for a week, no.

Q. It would not keep for a week? A. No, sir.

Q. Why not?

A. The cereal will sour in with the moisture.

Q. Does not that depend on the amount of cereal you have?

A. No, sir.

Q. Will two per cent of cereal sour? A. Yes, sir.

Q. The Government allows you to use two per cent.

A. It don't keep as well with cereal in.

Q. It don't keep as well with two per cent? A. No, sir.

Q. How would it be with one per cent?



A. I don't think it would keep with any cereal in as well as without cereal.

Q. Without any? A. No, sir.

Q. How long did you use cereal?

A. We used it about ten or twelve years.

Q. And you stopped when the Government passed this regulation? A. Yes, sir.

Q. Why did you use cereal for ten years if it spoiled the sausage? A. Everybody in the city used it.

Q. What is that?

164 A. Everybody in the city used it, all sausage makers.

Q. But you used it although you found that it injured your sausage?

A. Those days we did not look at it that way.

Q. You did not look at it that way in those days. You did not sell your customers sour sausage, did you?

A. When they were sour I did not sell them; they had to be sold fast, quick.

Q. You had to sell them fast?

A. We had to sell them quick.

Q. As a matter of fact, you did not sell them sour sausage, did you? A. No, sir.

Q. So while you were using cereal, as long as you kept it cold, it kept all right?

A. As long as we kept it cold.

Q. It would keep all right as long as you kept it cold; Any fresh sausage ought to be kept cold?

A. All fresh sausage ought to be kept cold, yes, sir.

#### Redirect Examination

By Mr. Woodward:

Q. The more cereal you use in a sausage the more it lessens its keeping qualities, does it not, Mr. Grozinger?

A. Yes, sir.

Q. That is, a sausage with five per cent cereal added will not keep as long as a sausage with two per cent cereal added: Is that correct? A. Yes, sir.

Q. Are you familiar with the customary way in which sausages are handled from the manufacturer to the consumer?

A. Yes, sir.

165 Q. In your opinion, will a sausage with five per cent cereal added keep during the exposure incident to its travel from the manufacturer to the consumer?

A. No, sir, unless it is kept very cold.

Q. You think, then, that a sausage with five per cent cereal added would probably spoil before it could reach the consumer? A. Yes, sir.

Judge Ferriss: Q. What is that?

A. It would spoil.

Mr. Woodward: Q. Did you use cereal in your sausages, Mr. Grozinger, because it made a better sausage, or because you—

Judge Ferriss: Wait a minute: Suppose you ask him a direct question.

Mr. Woodward: Q. Why did you use cereal in your sausages, Mr. Grozinger? A. Because it made it cheap.

Q. Why did you find it necessary to make a cheaper sausage? A. On account of meeting competition.

Q. You mean by that, then, that your competitors were using cereal in sausages? A. Yes, sir.

# Recross Examination

By Judge Ferriss:

Q. They all used it? A. Yes, sir.

Q. Everybody used it? A. Yes, sir.

Q. It has been used for a great many years, has it not?

A. Yes, sir.

Q. And yet you think that all sausage that has been made with cereal during all these years, would spoil before it reached the consumer: Do you think that is so?

A. It would not keep the taste as well as the pure sausage.

Q. How could you keep your trade if the sausage was spoiled before it got to the consumer?

A. There were no other sausages to be got those days.

Q. They all had to eat spoiled sausage, is that the idea?

A. At that rate, yes, sir.

Q. They all ate spoiled sausage in those days?

A. Yes, sir.

Q. You say you used two or three per cent of cereal?

A. Yes, sir.

Q. That is all you ever used?

A. Yes, that is all I can recall that I ever used.

Q. Is your recollection clear on the subject?

A. Yes, sir.

Q. Then if you never used more than three per cent how do you know that five per cent would hurt it?

A. Well, the more you use—

Q. I want you to speak now from your own knowledge.

A. Yes. The more you use the worse it is for the sausage, and the quicker it sours.

Q. Mr. Grozinger, is it not a fact that if sausage with cereal is kept cold and shipped in refrigerator cars until it reaches the retailer, that it keeps perfectly well?

A. It would that far, yes, but the consumer has to  
167 keep it until he can sell it, on his counter.

Mr. Woodward: Q. You mean the retailer, not consumer?

A. Yes, sir.

Judge Ferriss: Q. Don't you know that the bulk of sausages that are sold in the trade are smoked, or cooked sausages, like bologna and frankfurters? A. Yes, sir.

Q. Is it not a fact that in the total consumption of sausages in the country, what we call a fresh pork sausage is a very small amount? I am talking now about the sausages made by packers, not retail butchers: That is true, is it not?

A. The smoked sausage is the larger amount.

Q. Very much the larger amount? A. Yes, sir.

Q. What kind of beef did you use before this regulation went into effect?

A. I never used anything else but bull beef.

Q. You never used anything but bull beef? A. No, sir.

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Note: By consent of the parties the signatures of the witnesses were waived.

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168 (Certificate of Notary to Depositions of G. A. Hohman, et al.)

I, Mildred J. Cook, a Notary Public in and for the City of St. Louis and State of Missouri, do hereby certify:

That the foregoing depositions of George A. Hohman and Christian Grozinger, taken by consent of the parties before me, was taken on behalf of the defendants in the above entitled cause; that said depositions were taken before me at the office of the United States District Attorney, Custom House Building, St. Louis, Missouri, beginning at the hour of 10:30 o'clock in the forenoon of Friday, December 17, 1915; that said witnesses were by me duly sworn before the commencement of their depositions; that said St. Louis Independent Packing Company, Plaintiff, was represented by counsel during the taking of such testimony, and that said Defendants, Hon. David F. Houston, Sec. of Agriculture, et al., were also represented by counsel during the taking of same; that the signatures of the witnesses were waived, by

consent of the parties, and that I am not interested directly or indirectly in the matter in controversy.

In Testimony Whereof, I hereto set my hand and affix my notarial seal at the City of St. Louis, State of Missouri, this 18th day of December, 1915.

(Seal)

MILDRED J. COOK,  
Notary Public, City of St. Louis.

My commission will expire October 20, 1918.

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169 PAUL VIEZENS, recalled testified on behalf of the defendant, as follows:

Direct Examination

By Mr. Woodward:

Q. Mr. Viezens, upon yesterday something was said about the Government permitting the use of cereal in other meat food products than sausage: To what other meat food products does that regulation refer, Mr. Viezens?

A. Potted meats.

Q. How are potted meats prepared?

A. Chopped just the same as sausage meat, and stuffed in cans, and then it is sterilized or cooked in gas retorts.

Q. At what temperature? A. About 210 to 220.

Q. Mr. Viezens, why is potato starch not used in the manufacture of sausage rather than cornstarch or some other cereal?

Judge Ferriss: That is objected to—

Mr. Woodward: I will withdraw the question.

Q. Does potato flour as used in the manufacture of sausage absorb water, Mr. Viezens?

Judge Ferriss: We are not dealing with potato flour.

The Court: (To the witness): You may answer the question.

A. It does not absorb very much in the cold state, that is, in the raw state as we use it in sausage.

Cross-Examination

By Judge Ferriss:

170 Q. The question asked you by the District Attorney refers to the following paragraph, which has already been offered in evidence:

"When cereal is added to any meat food product other than sausage, in quantities not exceeding five per cent, etc., the words 'cereal added' shall be in the name, and when it exceeds five per cent it shall appear as part of the name:

You say that the other meat food products covered by that regulation refer only to potted meats?

A. The regulation provides for that. I couldn't answer that.

Q. Why did you say a moment ago when counsel asked you to what it referred, that it referred to potted meat? Do you mean by that to say that that is the only other meat food product that is made—

A. That is covered by the regulation.

Q. I know it is covered by it, but is that the only thing that is covered by it; do you know?

A. I guess I couldn't answer that. Perhaps I don't understand it right, what the meaning of it is.

Judge Ferriss: I will ask the stenographer to read his answer to the question asked by the District Attorney.

(Question and answer read as requested.)

A. That is the potted meat.

Judge Ferriss: Q. I ask you whether it refers to potted meat only?

A. No, sir, there is another article which we call loaf.

Q. Loaf? A. Loaf, yes, sir.

Q. It is not put in sealed cans?

171 A. It is not. It is not put in casings, either.

Q. That is just wrapped up and sold?

A. No, sir, it is put in bread pans, so we can call it—it is not a sausage, it is made similar to the potted meats only it is roasted in an oven and there it gets heat of about 300 that gives the inside of the product about 190 or 192.

Q. This regulation reads:

"shall appear as part of the name in style of letters, for example 'potted meat and cereal.'"

What do the words "for example" mean there? Do you know? You are an inspector, are you not?

A. Yes, sir.

Q. Is it not your duty to construe these regulations?

A. Yes, sir.

Q. How do you construe that expression "for example?"

A. Well, for an example, like potted meats. That is an article that is not in casings so it could not be considered a sausage.

Q. That means that potted meats is one of the things that is meant by "other meat food products?"

A. Yes, sir.

Q. The regulation does not undertake to indicate all of the meat food products that are covered by it, is not that true?

A. Yes, because there is meat loaf, is one of them.

Q. Is there not a product put up called pudding?

A. There might be.

Q. Baked beef? A. I suppose there is.

Q. Scrapple? A. Yes, sir.

172 Q. Sosera?

A. There is a sosera we make, yes, sir.

Q. All those products may contain cereal to any extent, may they not? A. Yes, sir.

#### Redirect Examination

By Mr. Woodward:

Q. The word "loaf" as you used it necessarily implies the use of cereal, does it not, Mr. Viezens? A. Yes, sir.

Q. It would not be a loaf unless cereal were present?

A. Yes, sir.

173 T. M. PRICE, recalled, testified on behalf of the defendant, as follows:

#### Direct Examination

By Mr. Woodward:

Q. Mr. Price, in going over your experiments yesterday you were asked the question how much salt you used in the manufacture of the sausage with which you experimented: Explain to the Court just how you fixed the quantity of salt that you used in the manufacture of these various sausages in your experiments?

A. We based the spices and salt on the amount of meat we used.

Q. The amount of salt and spices you used, then, was not based upon the total amount of product that you had, but upon the meat actually used?

A. Yes, in the ratio of the amount of meat we used.

Q. Did you ever conduct an experiment to show the food value of sausages with and without cereal?

A. Yes, sir. We made up a number of lots of sausage without any cereal, and without the addition of water; with

the addition of different quantities of cereal and different quantities of cereal and water, and took samples of the finished product and analyzed them and determined the food value of each lot.

Q. I show you a tabulated list and ask you if that is an accurate statement of the results which you obtained from those experiments?

174 Judge Ferriss: If your Honor please, I object to any inquiry on the subject of food value. That is not the question that we are trying in this case. It is not material. We are trying the question of a wholesome product. The Court of Appeals has settled that question. The Court has said, "The meat inspection law"—

The Court: I think, Judge Ferriss, that I will admit it subject to your objection, and hear later whether it has any reference or not—

Judge Ferriss: It is opening up an entirely new subject and I do not know to what extent it may string out this case.

The Court: Let it go into the record subject to your objection, and you may present your objection to it on the hearing finally.

A. It was found by our experiments that the larger the amount of cereal and water added the lower the food value of the finished product was.

Mr. Woodward: Q. That table accurately shows the results you obtained from those experiments, does it?

A. It does.

Q. That is expressed in calorie value: What do you mean by that? A. It is the heat unit value of the food.

Q. The heat unit value is what you use in determining what the food value of the product is?

A. Physiologically speaking.

175 Q. What temperature does a sausage reach when it is fried, Mr. Price?

A. We have carried out a great many experiments. In cooking experiments we have tried, the skillets we cook them in usually reach a temperature between four and five hundred. Sausage cooked until it is considered by the housewife well cooked does not reach more than 170 to 190 degrees Fahrenheit, on the interior.

Q. What is the temperature at which starch breaks up?

A. Starch grains break up at 212 Fahrenheit.

Q. When the grains of starch are not broken up does it impair digestion?

A. It lowers the digestibility of starch if you do not break up the starch grains.

### Cross-Examination

By Judge Ferriss:

Q. Mr. Price, the object of using salt is as a preservative, is it not?

A. No, sir, I couldn't say it was, in sausage.

Q. It is a preservative, is it not?

A. Yes, it has some preservative qualities.

Q. Has it not very important preservative qualities?

A. If used in sufficient quantities.

Q. As a matter of fact, meats are cured with salt, are they not? A. Yes, sir.

Q. Is there any absolute standard as to the amount of salt that is to be used in any particular product?

176 A. Each manufacturer, I suppose, has his own standard

Q. That is true of spices, too, is it not, and true of all ingredients, that each man mixes them according to the product he wants to produce? A. His own private formula.

Q. The more salt you use the better preservative effect you produce? A. Yes, sir.

Q. When you say that the use of cereal and water lowers the food value, what you mean, I suppose, is that there is less protein in the resulting product?

A. No, I should not say that.

Q. What do you mean?

A. I say it lowers the fat quantity in that more than the protein.

Q. Lowers the fat?

A. Yes, the fat has a higher caloric value than the protein.

Q. Your idea is that protein has a higher food value than fat?

A. No, fat has just twice the caloric value as protein.

Q. What is that?

A. Fat has a higher caloric value than protein.

Q. I am not talking about the caloric value.

A. That is what my experiments are based on, the caloric value.

Q. Has not carbo-hydrate higher caloric value than protein? A. No, sir, it has the same.

Q. Then it does not lower that?

A. Not as far as the protein is concerned.

Q. What does the carbo-hydrate lower?

177 A. It lowers the muscle-building quality of the food.

Q. Do you understand that the muscle-building quality is the only quality desired?



A. I think as far as the meat is concerned it is eaten for the muscle-building quality.

Q. I am talking about food generally.

A. We are considering sausage, I thought.

Q. Do you consider the muscle-building quality of food its highest value? We are talking about food now.

A. It depends upon the person that eats it. If they want to eat it for the muscle-developing quality that is the most important one.

Q. I understand that food builds up muscle and also produces heat and energy: Is that correct?

A. That is right.

Q. Heat and energy come from fat, from cereal, or from carbo-hydrates? A. Protein, too, to a certain extent.

Q. And the muscle-building quality is produced by protein? A. Mostly, yes, sir.

Q. Mostly? A. Yes, sir.

Q. It is quite as essential to human economy to have the heat and force as it is to have the building quality?

A. Yes, sir.

Q. How, then, can you institute any comparison as to the superior value of one over the other as a food value?

A. The expression I gave was the heating quality, the caloric value which usually they interpret foods in, the caloric value.

Q. When you say it lowers its food value you do not mean to say that it gives any improper food?

178 A. I mean to say it does not give as much heat as if it had a higher caloric value.

Q. But the heat that it does give is good heat, is it not?

A. Absolutely.

Q. So when you say "lower food value" you mean relatively it gives less of one element than another?

A. It gives less heat than if you had a little more caloric value.

Q. You would not say that carbo-hydrates are not essential in food? A. No, sir.

Q. And they are a wholesome element?

A. Not if not cooked properly. If cooked properly they are perfectly wholesome.

Q. And they are necessary? A. Carbo-hydrates?

Q. Yes.

A. Well, I don't know but what we can get along without them.

Q. So that the food element contributed in sausage by cereal is a wholesome, proper and essential element in human food? A. If the cereal is properly cooked.

Q. Put any qualification you please on it.

A. We have to make it digestible, that is all.

Q. I will put it in another form: Carbo-hydrate is a wholesome, necessary and proper element of human food?

A. Yes, sir.

Q. That element is furnished by corn meal, among other things?

A. It would not be furnished if it was not digested. It could not be absorbed unless it was digested.

179 Q. It would not be furnished if it were in the next town, either. I am asking you whether corn meal furnishes carbo-hydrates? A. It does.

Q. And under proper conditions is assimilated in the human system? A. Yes, sir.

Q. It becomes an essential element of food: That is correct, is it not? A. Perfectly.

Q. Are you a physician? A. No, sir.

Q. Have you ever made a careful study of the human body, inside and out? A. No, sir.

Q. Have you ever pursued any medical experiments on the subject of digestion? A. Yes, sir.

Q. As a physician?

A. As a physiological chemist, yes, sir.

Q. As what? A. As a physiological chemist only.

Q. As a physiological chemist only? A. Yes, sir.

Q. Do you know what goes on in the human body in the way of assimilating food?

A. As far as digestion is concerned I am pretty well familiar with it.

Q. Do you mean to say that you, or any other scientist can tell what takes place in the human body in transforming food into living tissue and blood and heat and energy?

A. We can come pretty near it.

Q. Can you prophesy in advance what the effect of food a man eats will have on his system?

A. Comparatively, yes.

Q. How do you account for the fact that what is one man's food is another man's poison?

A. That is an idiosyncrasy, I think.

180 Q. What is that?

A. I would call that an idiosyncrasy.

Q. So that the rules that you go by and the facts that you discover in your investigations are not always effective?

A. You have to try it on a healthy individual.

Q. What do you mean when you say "lowering the digestion?"

A. It makes it less digestible and takes it longer to digest.

Q. You do not mean to say that it cannot be digested?

A. No, I don't mean to say that. I mean that it takes it longer.

Q. You find that many people take a long time in digesting all kinds of food, as compared with others, do you not?

A. Yes, sir.

Q. Some people digest their food very rapidly as compared to others? A. That is true.

Q. That is true of all elements of food, is it not?

A. Yes, sir.

Q. There is not any absolute rule? A. No absolute rule.

Q. Do I understand you to say that science has reached a point where it can penetrate into the mysterious recesses of the human body, and watch, and note, and make a record of what takes place in the transmutation of food into vital life?

A. You understood me to say that they could conduct experiments along physiological and digestive lines so they could tell whether the food was digested or not, and whether it was assimilated.

Q. It is generally known, is it not, that certain foods  
181 are more indigestible than others; it is recognized, is it not? A. I believe that is true, yes, sir.

Q. Do you not publish tables showing how long it takes to digest different foods? A. Yes, sir.

Q. The difference between a roast and fried meat and chicken and turkeys and apples; You can tell, generally speaking, how much time (I suppose that means in a normal healthy body) it takes to digest certain things: It does not follow that because it takes longer to digest roast beef than it does a baked apple, that the roast beef is lower in quality of food than the baked apple, does it?

A. Well, you couldn't compare a baked apple with roast beef as far as food value is concerned.

Q. Why not?

A. Because baked apple has very little food value.

Q. It takes longer to digest roast beef than it does baked apple, does it not? A. I don't know as it does.

Q. Get out your table and look and see: Is not baked apple an easy food to digest?

A. Baked apple has only starch to contend with.

Q. But it is very quickly digested, is it not?

A. I guess you are right. It is practically digested before you get it into the system; it is pre-digested.

Q. It takes much longer to digest roast beef? A. Yes, sir.

Q. Would you say roast beef has less food value because of that fact?

A. In minutes of digestion it has.

182 Q. Is it not a fact that roast beef has a food value largely in excess of baked apples?

A. Yes; it has more food value to begin with.

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183 FLOYD W. ROBINSON, recalled, testified on behalf of the defendant, as follows:

Direct Examination

By Mr. Woodward:

Q. You have been sworn? A. Yes, sir.

Q. Mr. Robinson, does the use of cereal in excess of two per cent and water in excess of three per cent, in the manufacture of sausage, affect the wholesomeness as a meat food product of the resulting product? A. Certainly, it does.

Q. In what way does it affect it? I mean, in your opinion does it lower it or raise it?

A. It makes it less wholesome.

The Court: Q. Would you say that a meat product, sausage, for instance, containing from five to ten per cent of cereal, added to which is fifteen or twenty per cent of water, would you or would you not say that that is a wholesome product?

A. I would say, your Honor, in part it is unwholesome.

Judge Ferriss: Q. What is that?

A. I would say in part it is unwholesome.

The Court: Q. Would you say that such a product was either sound or healthful?

A. I would not say it is sound or healthful, your Honor. On the other hand, I would not specifically say it was unsound or unhealthful.

Judge Ferriss: (To the witness) Speak louder, please.

The Witness: In answer to the Court's question, I would not say that it is sound or healthful. On the other hand,  
184 I would not necessarily say that it is on that account unsound or unhealthful except as covered by my definition of wholesomeness.

The Court: Q. Taking all of these ingredients together: Say 70 per cent of meat, 10 per cent of cereal and 20 per cent of water: Would you say that that product, taking all of these matters into consideration, would produce a sound, healthful or wholesome product?

A. I would not say so.

Q. Would you say that it would not?

A. I would say in part it would not, yes, sir.

The Court: Proceed.

#### Cross-Examination

By Judge Ferriss:

Q. I understand you to say that you would not say that cereal and water so used are sound and healthful?

A. So used, I would not say they are sound and healthful.

Q. And you would not say that they were unhealthful? That is what you stated to the Court.

A. I stated that I would not say they were unhealthful except as covered by my definition of wholesomeness.

Q. Then I suppose we will have to get your definition of wholesomeness.

A. My idea of wholesomeness as applied to this product refers to questions of readiness of digestibility.

Q. That is the whole business; that is the sum and substance of your objection, is it, that it affects the question of digestibility?

A. It does affect it, yes, sir.

Q. You do not mean to say that corn meal is an unwholesome article? A. Not as corn meal, no, sir.

Q. You do not mean to say that water is an unwholesome article? A. Not as water, no, sir.

Q. Do you mean to say that corn meal and water in combination becomes unwholesome?

A. Depending upon the combination, yes, sir.

Q. But if they do become unwholesome it is only in regard to digestibility?

A. With regard, principally, to digestibility.

Q. But as ingredients, as articles of food, you do not mean to say that corn meal is unwholesome as an article of food?

A. In some articles of food—

Q. Is it unwholesome in Johnny cake?

A. No, sir, I do not consider it so.

Q. Is it unwholesome in pudding and milk?

A. It may be, yes, sir.

Q. It may be unwholesome? A. Yes, sir.

Q. You recognize that corn meal is a very staple article of food, of course? A. Yes, sir.

Q. In all countries where it is available?

A. Yes, sir, it is.

Q. And it is made up in many different forms?

A. It is.

Q. Some that you think present it in a very indigestible form?

A. Some corn meal products are presented in a very undigestible form.

Q. Can you not put up almost anything in such shape  
186 as to make it less digestible? A. Yes, sir.

Q. Then you could hardly say any article of food is absolutely wholesome under all conditions?

A. No, sir, it is not. That is very true.

Q. What you say as to corn meal applies equally well to the meat that is in sausage?

A. Not equally well, but it may apply to it.

Q. In part? A. Yes, sir.

Q. So that the meat that is used in sausage may be, depending on how it is treated, in part unwholesome?

A. It may and it very frequently is.

Q. That is true of any food? A. Yes, sir.

Q. As a scientific proposition?

A. As a scientific proposition and as a practical fact.

Q. I meant to ask you what is the digestibility that you are talking about?

A. Digestibility is the preparation of food for absorption by the body.

Q. That is a process that goes on in the human system?

A. Yes, sir.

Q. It is necessary that the food should be transformed by chemical action, would you say?

A. Yes; biological action, yes, sir.

Q. So that it can be assimilated? A. Yes, sir.

Q. Can be absorbed in the body and perform its function, whether it is heat, or energy, or building up muscle?

A. That is correct.

Q. If a food is so prepared, or is of such a character that that process is diminished in time, you would say that  
187 that impairs its wholesomeness in part: Is that your idea?

A. Let me be sure I understand your question right.

Q. Perhaps I did not frame it very well, I will repeat it: If the food is of such a character in itself, or is so prepared as to lengthen the process of digestion of the entire product, you would say that that diminishes its wholesomeness? A. Yes, unquestionably.

Q. So that it comes down to this: That a food that digests slowly is unwholesome?

A. A food which normally digests rapidly, if by any means it is made to digest slowly that becomes to that extent unwholesome, yes, sir.

Q. That is because a slow digestion is more injurious than a rapid digestion? A. No, not necessarily.

Q. If it is finally digested, it is digested, is it not?

A. Yes, but the distinction is this: A product which is normally digested rapidly in the system, we will say a meat product, which by any means is made to digest slowly in the system through stagnation, for instance, in the intestinal canal, to that extent is made unwholesome. That is one of the basic points of auto-intoxication.

Q. If it is finally digested perfectly then it is all right, is it not? A. No, it is not.

Q. Is it not true that many articles of food are slower of digestion than others? A. Yes, that is true.

Q. That mere fact does not make them unwholesome?

A. Not that mere fact alone, no, sir.

188 Q. Would you say that corn meal is slower of digestion than meat?

A. Yes, sir.

Q. That mere fact does not make it unwholesome?

A. Not as corn meal, no.

Q. The time of digestion does not necessarily affect the food value? A. No, not necessarily.

Q. Do you happen to know, Mr. Robinson, that the favorite dish in many restaurants is sausages and cakes, griddle cakes?

A. Yes, sir.

Q. They go together rather naturally, do they not?

A. Yes, sausages and cakes are frequently eaten together.

Q. That is a sort of natural combination, is it not?

A. Yes, sir.

Q. Those griddle cakes may be corn cakes, or wheat cakes, or buckwheat cakes?

A. Yes, sir.

Q. Do you consider that an injurious ration, mixing them that way?

A. Not if the cakes are well prepared; it is not, if they are well baked; otherwise it is not very wholesome.

Q. I was assuming that they are properly baked, of course, I suppose anything can be spoiled by preparation, can it not?

A. Yes, insufficient preparation.

189 Q. If corn meal and beef can be eaten at the same meal, from the same plate, and put together upon the same fork, why can they not be mixed together in sausage?

A. So far as ability is concerned they could, but very frequently in corn meal, the cakes in the meal, are the things that contribute to the unwholesomeness of that meal.

Q. Which you think do not digest well?

A. I do not. It is a notorious—

Q. Your whole idea is that the imperfect digestion of a food, or a food that is imperfectly digested is, insofar as it is imperfectly or slowly digested, unwholesome?

A. Yes, sir.

Q. It is better for the human system to digest its food promptly?

A. It is better, and cereals are peculiarly susceptible to that condition, in that they are the items in the food which so frequently contribute to its unwholesomeness because they are not well prepared.

Q. It is a fact that cereals constitute the larger portion of human food, is it not?

A. Cereals constitute a considerable portion of most people.

Q. Do they not constitute the larger proportion in the ordinary dietary? A. No, sir.

Q. Is that not true of children particularly?

A. It is not true in my family at all.

Q. Perhaps you are not an expert on that subject.

A. I am. I have four children.

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190 Mr Woodward: I offer in evidence the tabulated result of the experiments as to the caloric value, identified by the witness Price, and ask that it be marked "Defendant's Exhibit B."

The paper last referred to is accordingly marked "Defendant's Exhibit B," and is in the words and figures as follows, to-wit:

"4.1 Caloric, one gram of protein the same, and one gram of fat 9.5 Caloric;



## Uncooked Unsmoked Sausage:

		Percent water	Percent protein	Percent fat	Percent cereal	Caloric value
No cereal.	No added water.	55 10	16 89	21 2		270
2% cereal.	No added water.	56 70	15 33	19 6	2 00	256
2% cereal.	3% added water.	56 80	14 80	19 5	2 00	254
2% cereal.	10% added water.	61 00	12 71	17 7	2 00	227
3% cereal.	No added water.	55 20	14 85	18 8	5 00	238
5% cereal.	10% added water.	61 90	13 83	16 1	5 00	208
10% cereal.	No added water.	52 90	15 45	18 5	10 00	238
10% cereal.	10% added water.	61 30	12 44	14 1	10 00	185
10% cereal.	40% added water.	69 00	8 09	9 2	10 00	120

## Smoked Sausage

No cereal.	No added water.	52 90	17 88	21 4	0	276
2% cereal.	No added water.	51 80	17 75	21 5	2	276
2% cereal.	3% added water.	51 50	18 09	21 6	2	279
2% cereal.	10% added water.	56 50	16 59	19 1	2	248
5% cereal.	No added water.	51 40	17 73	19 3	5	255
5% cereal.	10% added water.	58 80	14 13	17 4	5	222
10% cereal.	No added water.	53 40	16 90	16 9	10	229
10% cereal.	10% added water.	56 00	16 14	15 7	10	215
10% cereal.	40% added water.	65 00	11 59	12 0	10	161

## Sausage Smoked and Cooked

No cereal.	No added water.	54 40	18 14	21 5	0	278
2% cereal.	No added water.	52 90	18 41	20 7	2	271
2% cereal.	3% added water.	53 90	17 98	20 7	2	279
2% cereal.	10% added water.	55 80	17 40	20 4	2	264
5% cereal.	No added water.	52 90	16 98	18 2	5	241
5% cereal.	10% added water.	54 7	17 02	19 7	5	256
10% cereal.	No added water.	50 6	16 70	19 2	10	250
10% cereal.	10% added water.	56 4	17 11	14 4	10	206
10% cereal.	40% added water.	63 3	10 32	13 1	10	166

191 Mr. Woodward: That is the Government's case, if the Court please.

The Court: May I ask before you close; I notice in the closing part of this Answer you say:

"Defendant, further answering, states that since the filing of this suit and previous to the service of the subpoena on him in said cause the regulation set forth in paragraph 9 of the bill had been superseded by regulations governing the meat inspection of the United States Department of Agriculture contained in B. A. I. order 211, which were promulgated on July 15, 1914"—

Judge Ferriss: They were superseded, but not changed.

The Court: I don't know what that is.

Judge Ferris: I think the Government will agree to that statement.

The Court: Let it be put in so I may see what it is.

Mr. Woodward: It is already in the record. The first regulation covered two different subjects, and when they were superseded they split it up so the paragraph covering—the language of both regulations is the same as far as it affects sausage and the manufacture of sausage.

Judge Ferris: It is already in.

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(Testimony for Complainant in Rebuttal.)

And thereupon the complainant, on its behalf, introduced the following evidence in rebuttal:

192 OSCAR F. MAYER, a witness of lawful age, being produced, sworn and examined, testified on behalf of the complainant in rebuttal, as follows:

Direct Examination

By Judge Ferriss:

Q. Will you state your name, please? A. Oscar F. Mayer.

Q. Where do you live, Mr. Mayer? A. Chicago.

Q. What is your occupation?

A. Packing and sausage business; manufacturer of sausage.

Q. What is the style of your business, what is the name of your concern? A. Oscar F. Mayer & Brother.

Q. How long have you been in that business?

A. Forty-three years.

Q. In Chicago? A. Detroit and Chicago.

Q. What is the character of your business, what do you manufacture?

A. We are manufacturers of sausages and packing house products.

Q. Have you done an extensive business in sausages?

A. Quite.

Q. You say you have been making sausages for how many years? A. Forty-three years.

Q. How many varieties do you make? A. Forty.

Q. Do you make what is called fresh sausage?

A. Yes, we make fresh sausage.

Q. Summer sausage? A. Summer sausage.

193 Q. Do you put up bologna, frankfurters, wieners, and all kinds of sausage? A. Yes, all kinds.

Q. What you call fresh sausage?

A. Fresh sausage. Under the name goes sausage made out of fresh meat, mostly pork.

Q. In the preparation of these sausages what is the general process, do you treat them at all after they are stuffed?

A. The fresh sausage? No.

Q. Are they smoked or dried?

A. Not the fresh sausage is not smoked or dried; that goes under pork sausage.

Q. What proportion of the sausage that you manufacture and sell is stuffed in cases? A. Oh, probably 98 per cent.

Q. Practically all of it?

A. Practically all of it, yes, sir; very little, some—

Q. What proportion of your fresh sausage business is done in Chicago, the local market?

A. My fresh sausage business?

The Court: Q. Do you sell more in Chicago than anywhere else? A. Yes, 75 per cent.

Judge Ferriss: Q. Would you say about 75 per cent?

A. Yes; 70 to 80 per cent.

Q. How is that delivered to the trade?

A. It is delivered in boxes.

Q. How often? A. In cartons. Daily.

Q. You make daily deliveries?

A. We make daily deliveries, yes, sir.

Q. What is the time, ordinarily, the average time, before the sausage is sold by the retailer after you deliver it?

194 A. Well, that is delivered about the same day, or the next day.

Q. The same day? A. Yes, sir.

Q. You say they get daily supplies? A. Daily supplies.

Q. Do you ship any fresh sausage? A. Yes, sir.

Q. Is that shipped in refrigerator cars?

A. Yes, sir, especially in summer time.

Q. When the sausage is delivered to the retailer it comes from a cooler, I suppose?

A. It comes from the cooler.

Q. And he takes it to his place and sells it to the customer that same day?

A. Yes, sir. Sometimes there is some left over, I presume, but it is regularly sold the same day.

Q. Have you ever used cereal in the manufacture of sausages? A. I did, sir.

Q. In what sausages do you use it?

A. I use it in fresh sausage.

Q. What are your fresh sausages composed of, what do you make them from?

A. Pork sausage we make of pork only, as the Government demands.

Q. Take the bologna and frankfurters.

A. Pork and beef.

Q. You use beef? A. Yes; that means in bologna.

Q. You use meat trimmings?

A. We use meat trimmings, yes, sir.

Q. Just state generally what odds and ends you use.

A. We use the whole carcass, even rounds of the beef, the trimmings of pork, mixed together.

195 Q. Do you use hearts?

A. I use hearts to work up the product.

Q. Mr. Mayer, in the development of the sausage business has it had any effect of utilizing certain portions of the animal which otherwise would not be salable, like trimmings, and odds and ends?

A. Yes; even the heart would not be salable if it could not be utilized in sausage.

Q. All of these ingredients that go into sausage, all of these food products are, of course, inspected and approved by the Government? A. Yes, they are, sir.

Q. When a sausage maker uses hearts, ears, snouts and trimmings, and all that kind of thing, they are all recognized by the inspectors as proper articles of food? A. Yes, sir.

Q. What I want to know is whether that system of utilizing all such products has produced a cheaper product to the consumer than if you used only what are called prime cuts.

Mr. Woodward: That is objected to—

A. Yes, sir.

Mr. Woodward: I think that is part of the case in chief and not proper rebuttal.

Judge Ferriss: I am just leading up to a point.

The Court: Proceed and we will find out all we can about it.

Judge Ferris: Q. It makes a cheaper product to the consumer? A. Yes, sir.

Q. What proportion of cereal do you use?

196 A. Well, that depends upon what it is used for, whether it is used for a binder, and sometimes we have used it to make the sausage cheaper.

Q. About what proportions, just give us—

A. From two to ten per cent.

Q. From two to ten per cent, depending on the character of the meat?

A. From two to ten per cent, depending on the character of the meat, and then depending on the market. For instance, since we use two per cent of cereal only we have lost, probably, a good deal of our trade.

The Court: Q. Why?

A. Somebody uses more and sells cheaper. I lost all the department stores' trade. Somebody makes it a cent cheaper and, of course, I cannot compete with them.

Q. The adding of cereal and water lessens the price that enables them to compete with you? A. Yes, sir.

Q. If you did not use it, and gave them straight sausage without using cereal, you would have to sell it at a higher price than they sell it?

A. Yes. I am unfortunately situated. I am the only one that has Government inspection, probably, within a radius of a million people.

Judge Ferriss: Q. You are under Government inspection? A. I am under Government inspection, yes, sir.

Q. And your competitors in Chicago are not?

A. Are not, a good many are not.

The Court: Q. They do not sell outside in interstate  
197 commerce, but sell to the local trade?

A. They sell to the local trade, the state of Illinois; there are three or four million people.

Q. Have you the State Inspection Law there, too?

A. Yes, they have.

Q. That State Inspection Law is not as effective as the other? A. No.

The Court: Proceed, that is all I want to ask.

The Witness: That is where the trouble is.

Judge Ferriss: Q. Up to the time this regulation was adopted in 1913, did the Government in any way limit the amount of cereal you used?

A. No. We worked up to the regulations, whatever they were. If it was—

Q. There were regulations regarding the name and the label?

A. The name and the label, yes. The Government regulates all that.

The Court: Q. Since the regulation was announced you have lived up to the regulation? A. Yes, sir.

Q. You have not used exceeding two per cent of cereal since the regulation was made by the Secretary of Agriculture? A. No, your Honor.

Q. How does it affect your trade, the two per cent cereal and the water not exceeding three per cent?

A. I never heard a complaint at all.

Q. You get along about as well with that as otherwise?

A. From the public standpoint, but not as a binder at times.

198 Q. But for this state law giving these people that are your competitors larger liberties, you would not say you could not carry on the business with the two per cent of cereal and three per cent of water as effectively as you could before? A. No, sir.

Judge Ferriss: Q. I do not understand what your answer is to that question.

A. I say, I cannot do as profitable business as before, by only using two per cent, and my competitor using ten per cent.

The Court: Q. That is to say, if your competitors who are doing only an intrastate business can use eight or ten per cent of cereal, you cannot compete with them in the local trade? A. I cannot, sir, no.

Judge Ferriss: Q. You cannot compete with the trade unless you are allowed to use the same ingredients?

A. No, sir.

Q. The Government has asked several witnesses here as to whether the use of cereal in the manufacture of sausage is necessary: We are not, of course, contending that sausages cannot be made without cereal, but I want to ask you this question on that point: Is it proper and desirable to use cereal and water in the manufacture of sausages in order to utilize to best advantage the various cuts, or particles of meat, that go into that sausage, having in mind the appearance, taste, the keeping quality, the cooking quality, and the cheapness to the consumer?

199 A. I would say yes. In some cuts it is absolutely necessary to use a binder.

Q. It is necessary to use a binder? A. Yes, sir.

Q. What do you mean by a "binder?"

A. Well, a binder—say to manufacture sausage an emulsion to bind the meat together; it otherwise would dissolve the same as any—

Q. You mean to say that with certain meats that you use they do not come together, that they fall apart?

A. Fall apart. You use an emulsion. I have even known that eggs have been used.

Q. In the manufacture of these sausages you make first a dough? A. A dough, yes, sir.

Q. How soft must it be?

A. That depends. The meat itself, the texture shows how much water it will take.

Q. That is stuffed into these cases? A. Yes, sir.

Q. In order to produce a uniform effect in the cases and give it the proper consistency in appearance, you use this binder? A. We use the binder.

Q. You say some meats require less binder than others?

A. Yes, sir.

Q. Give an example of meat that does not require so much binder.

A. Well, take bull meat, or heavy pork, such as—

Q. What cuts are—

A. It is dry meat that it does not need a binder.

Q. What kinds of meat do need a binder?

A. What we call the "short meats." That may come from watery Texas cows, and hearts. They need a binder.

200 Q. Does the use of cereal facilitate the stuffing?

A. It facilitates the stuffing?

Q. Is it desirable in order to stuff the sausage; does it have any effect on that?

A. I think it would stuff better, yes, sir; it keeps together.

Q. How about the appearance of the finished product; Does it affect that? A. Also.

Q. Does that depend upon what the meats are that you use?

A. Yes, sir. It fills it out better; it has more of a substance.

Q. Does it affect the cooking qualities of the sausage?

A. It keeps it together; otherwise it would separate most times.

Q. With regard to cost: In figuring the cost of your sausages you take into account, of course, the cost of materials: Do you figure anything else?

A. Material and labor.

Q. You figure the cost of meat that goes into that, and the cereal, and whatever it is? A. Yes, sir.

Q. Are there any other elements of cost, do you figure overhead charges?

A. Overhead charges, yes, sir.

Q. Entire cost of doing business?

A. Entire cost of doing business.

Q. In order to get at the effect of the cheaper material you would have to consider the entire cost of production?

A. The entire cost of production. We even pay the man that runs off or makes more; we pay him a premium.

201 Q. In your experience as a practical sausage maker selling to the trade for forty years, have you ever had any complaints, or any difficulties, on account of sausage with cereal not keeping? A. No, sir.

Q. Have you ever hear that claim made, that it would not keep so well? A. No, sir.

Q. Fresh meat will spoil in time, will it not?

A. It will.

Q. You have to keep it in a cooler? A. Yes, sir.

Q. After the retailer gets a cut of meat, a roast or steak, or small meat sausage, it has to be sold promptly—

A. Yes, sir.

Q. —if it is an ordinary temperature, to prevent spoiling?

A. Yes, sir.

Q. That is true of any perishable product?

A. Yes, sir.

Q. As far as your experience and your observation go, the use of cereal has cut no figure in that matter?

A. I have not noticed it.

Q. You say that the use of cereal cheapens the product?

A. Yes, sir.

Q. Does the consumer get the benefit of that?

A. He does.

Q. What is the extent of the consumption of sausages by laboring men, or people of moderate means?

A. A good deal.

Q. They use a good deal of sausage?

A. They use a good deal of sausage, yes; especially the foreign element.

202 Q. In order to meet that demand it is necessary to make as cheap a product as possible?

A. The quality is not looked upon much at all, especially in certain places. You have to prepare them for looks and cheapness.

### Cross-Examination

By Mr. Woodward:

Q. You stated that the use of cereal improved the appearance of sausage: Do you mean to be understood that you can tell the difference between a sausage which contains two per cent of cereal and a sausage which contains no cereal, by looking at it?



A. I have reference to meat which would not stand up without cereal; that mixed with cereal it would improve the looks of it, or the—

Q. In saying that the cereal improved the appearance of the product you referred only to the product where it is made from a few particular cuts of meat?

A. Yes; as I stated, where it is necessary to use it as a binder.

Q. Could you not use other meat as a binder, instead of the cereal? A. If you had it at times.

Q. Could you not take hearts, checks, and by using bull beef with them make a good product?

A. That makes a good product.

Q. The bull beef acts as a binder, does it not?

A. The bull beef acts as a binder, if you have it.

Q. Other cuts of beef can also be used as a binder, can they not? A. Well, yes; beef rounds.

Q. In reference to the difference in the cost of production: The cost of the labor and your overhead charges are the same, as far as the manufacture of sausage is concerned, regardless of whether or not you use cereal in your sausage? A. The same thing.

Q. So that the only different item is that of cereal?

A. Yes, sir.

Q. What do you pay for cereal, Mr. Mayer?

A.  $2\frac{3}{4}$ , I think. According to the market, whatever it is—

Q. Approximately  $2\frac{3}{4}$  cents per pound?

A.  $2\frac{1}{2}$  or  $2\frac{3}{4}$ .

Q. What do you pay, approximately, for the meat which you use in your sausage? I am asking for an average price.

A. Do I use the meat?

Q. Approximately how much you pay for the meat?

A. For the meat?

Q. For the meat?

A. Well, that differs. That is from six up to probably twelve; well, say from eight to fifteen; eight to twelve—eight to fifteen.

Q. You make sausage without using cereal, do you not?

A. Yes, sir.

Q. As a matter of fact, a large part of your sausage is made without the use of any cereal? A. Yes, sir.

Q. You stated that approximately 75 per cent of your business is in the city of Chicago?

A. Excuse me. When you say "without any cereal," I would answer that, up to Government regulation.

Q. You do make a large quantity without any cereal, do you not? A. My summer sausage.

204 Q. Why do you not use cereal in summer sausage?

A. I never practiced that.

Q. What is that?

A. I never have practiced making summer sausage with cereal. We have never made any with cereal.

The Court: Counsel asks why.

Mr. Woodward: Q. You never made any summer sausage with cereal? A. No, sir.

Q. Why? It will not keep as well, will it? A. Sir?

Q. It will not keep as well?

A. Alright. Say it does not keep as well. I can't answer that why. I don't do it. I haven't tried it, whether it keeps as well or not.

The Court: Q. What reason has it for not keeping?

A. I couldn't say what reason. We have never used it. We have never practiced that.

Mr. Woodward: Q. Cereal is not used in the manufacture of summer sausage by any sausage maker, is it?

A. It is in some, I understand.

Q. Is it not generally understood in the sausage trade that you cannot use cereal in summer sausage for the reason that it will not keep?

A. Well, I understood that it is used. I haven't used it.

Q. Do you know of any manufacturer who uses cereal in summer sausage?

A. I have understood that Armour & Company use it.

205 Q. You stated that approximately 75 per cent of your business was local: By that you mean 75 per cent of your sausage sales are in the city of Chicago?

A. Well, one-half, call it.

Q. That is true now, is it?

A. Well, I can't—I would not swear to that, whether it is 50 per cent or 75 per cent. I really have never watched that so close.

Q. But a large part of your business is local?

A. A large part of our business is local.

Q. To the City of Chicago? A. Yes, sir.

Q. And yet you state that you are the only Government inspected plant within a radius of how many miles?

A. Not a radius of how many miles: I say within a radius of a million people, almost.

Q. A million people?

A. Yes. That means my place from the other.

Q. And even since this Government regulation which prohibits the use of more than two per cent cereal and three per cent of water, you have actively competed in the city of Chicago with manufacturers who are using more cereal in sausage? A. Yes, sir.

Q. Has your business increased during the last few years?

A. Increased, yes, sir.

Q. It has increased quite a good deal, has it not?

A. Yes, sir.

Q. You have been very successful? A. Yes, sir.

Q. That is true even in spite of the Government regulation? A. Correct, sir. I would not not be without it.

206 The Court: Q. Be it without what?

A. Without the Government inspection, the regulation.

Q. A good deal of your business is outside of the city?

A. Yes, sir.

Q. In your business outside of the city you found in making sausage, prior to this regulation, two per cent of cereal and three per cent of water makes sausage that will sell readily outside of the city in interstate commerce?

A. To two per cent?

Q. Not exceeding two per cent.

A. Yes, that sells.

Q. There is no complaint about that, is there?

A. No complaint.

Mr. Woodward: Q. You stated there were places where you used cereal where you could use other meats as binders.

A. If you have other substances; if you would have a warm bull at the time when you make that sausage you could use that warm bull, but most of the time you haven't it, and by the time you get one, or the amount of meat, either—

Q. So if cereal cost as much as bull beef you would not use cereal as a binder, would you, Mr. Mayer?

A. Cereal you can have on hand as a dry product, and bull meat you haven't got. You haven't got bull meat all the time.

The Court: Q. Bull meat is worth more than cereal is it not?

A. Yes, sir, bull meat is worth more than cereal.

Mr. Woodward: Q. Will you answer the question?

A. And a good deal of time, if the bull meat is best for sausage, that is—

207 Q. What kind of cereal do you use in your plant, Mr. Mayer?

A. I don't know whether I am using corn or bean flour-bean flour, a flour accepted by the Government. It comes in under the food act.

The Court: Q. Do you have an inspector who inspects your meal, or your corn flour?

A. Yes, we have an inspector that inspects our meal or corn flour.

Q. Just as you have who inspects anything else?

A. Yes, sir.

Mr. Woodward: Q. Why do you not use potato flour? That is equally as good as a binder, is it not?

A. I am not using it.

Q. Why do you not use it?

A. I can't answer that.

Q. It costs more, does it not?

A. I don't know, sir.

Q. You do not know what the price of potato flour is?

A. I do not know what the price of potato flour is. I am not using potato flour.

Q. Did you ever make sausage with potato flour?

A. I did, sir.

Q. Potato flour in the cold state in which it is mixed in sausages will not absorb water, will it?

A. I couldn't answer that.

Judge Ferriss: Q. Why does the Government forbid the use of potato flour if they object to the use of—

A. I don't know if the Government objects to the use of potato flour.

Q. The regulation forbids the use of potato flour, do you know that? A. Sir?

208 Mr. Woodward: I was trying to get some information about the sausage business.

The Court: Proceed and try this case.

Mr. Woodward: I think that is all.

#### Redirect Examination

By Judge Ferriss:

Q. You have a large trade in Chicago?

A. I have a large trade, yes, sir.

Q. And have been established many years?

A. I have been established forty-three years.

Q. You have your customers that you have had for a great many years? A. Yes. I have very seldom lost one.

Mr. Woodward: I might say, if the Court please, it has just been announced that the Government prohibits the use of potato flour. This is not the case. I am announcing this for the information of the Court.

Judge Ferriss: The regulations speak for themselves.

209 JOHN P. O'HERN, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the complainant in rebuttal, as follows:

#### Direct Examination

By Judge Ferriss:

Q. State your name, please? A. John P. O'Hern.

Q. Where do you live, Mr. O'Hern? A. Chicago.

Q. What is your business?

A. General Superintendent, Armour Packing plant.

Q. General superintendent? A. Yes, sir.

Q. What duties are involved in that position?

A. The general supervision of the operating, and process of manufacturing and slaughtering.

Q. Does that cover all departments?

A. All departments, yes, sir.

Q. Has Armour & Company a sausage department?

A. Several of them.

Q. Do they do a large sausage business, or a small sausage business? A. Large.

Q. How many varieties of sausages do they make?

A. We make, oh, possibly fifteen or twenty—possibly more, different brands.

Q. Do you sell all over the country?

A. We sell all over the country.

Q. When you supply distant markets, the eastern markets, for instance, do you ship from Chicago, or do you manufacture in the east?

210 A. We manufacture in the east to a large extent. We have a branch house, sausage factories, established at various places throughout the United States, as well as at the packing plants.

Q. How long have you been familiar with the manufacture of sausages?

A. About sixteen years I have been in direct contact with that.

Q. Have you had occasion to post yourself as to the practice of sausage makers throughout the country, and what their general method of [procedure] is? A. Yes, sir.

Q. What they use in making sausages? A. Yes, sir.

Q. Has there been any change or development in the sausage business as to the products of the animals which are used, as compared with what had theretofore been used? Has there been any utilization of what I might call "by-products?"

A. In the last fifteen or twenty years the utilization of by-products has increased very materially. A large number of by-products that were formerly wasted and thrown away, and in some instances disposed of in tanks, are now utilized as food.

Q. In the manufacture of the commercial sausages which are sold to the trade generally, speaking more of the cheaper grades of sausage, do you use what we call "prime cuts" in the manufacture of those sausages; that is, the high priced meat?

A. Very few, if any, prime cuts are used in manufacturing sausages. Sausage factories were really instituted in 211 the packing industry to utilize a large amount of the by-products and small trimmings, and portions of prime cuts, in what may be termed meat food products, under the Bureau of Animal Industry protection.

Q. All these materials are approved by the Government as being suitable for food? A. Yes, sir.

Q. In the utilizing of these by-products, more particularly, has it been the practice among sausage makers to use anything as a binder? A. It has been.

Mr. Woodward: I will have to renew my objection to this form of question on the ground that it is not rebuttal, but the case in chief, and it does not—

The Court: I will let him put it in. Get all the facts, whether it is in chief or rebuttal. We will get all the facts touching the manufacture and sale of sausage, and what goes into it in any way, and get it into the record.

(Previous question read.)

Judge Ferriss: I understand he may answer the question?

The Court: Go on.

The Witness: In the manufacture of most of the sausage it has been necessary to use a binder of some character. A binder may consist of gelatine of meat, which is found more extensively in certain cuts and certain products of meat, and it has also been customary to substitute as a binder, cereal.

Q. Are there certain classes of meat that can be used as a binder?

212 A. Yes; the base portions of the meat, principally, of the carcass, of the hind quarters and fore quarters.

Q. There has been something said here about bull beef.

A. Bull beef has decidedly more binding qualities than the other beef because it contains less moisture and more gelatine.

Q. Is bull beef always available? A. No, sir.

Q. You say that cereal is sometimes used? A. Yes, sir.

Q. Do you know, or have you had occasion to post yourself as to the extent to which cereal has been used, geographically?

A. I have had occasions to do some research work two or three years ago. I found that cereal had been used in combination with meat products and sausages in England, Ireland, the New England states, Pennsylvania, Germany, and, I believe, in Italy.

Q. What was the practice among packers in this country?

A. Among packers in this country it was to use cereal in greater or lesser quantities.

Q. Had the Government at any time since the passage of this meat inspection act until this regulation was passed, sought to control the use of cereal as to quantity?

A. They regulated by—they covered it by regulation that defined the quantity by a term they used “with cereal” or “cereal added.”

Q. That is, the regulation was as to the name?

A. That is the regulation was as to the name.

Q. But was there any limit put on the amount of cereal?

A. No, sir.

213 Q. No question as to its use, and is it permitted now, as a matter of practice, in other meat food products?

A. Yes, sir.

Q. What are these other meat food products, are they also chopped meats?

A. It is used in loaves of various characters. There are five or six different kinds of loaves. Puddings, that are similar in character to sausage. In two or three products that are now known under other names, consisting of chopped meats and cereal.

Q. Are you able to state whether this product which you made, which we call sausage with cereal added, whether the Government would permit it to be sold under another name?

A. Yes, sir.

Q. That is to say, you could take this same product and if you did not call it sausage you could sell it? A. Yes, sir.

Q. And you could use any amount of cereal in it?

A. That is, any amount in conformity with the branding.

The Court: Q. If you made sausage and wanted to call it something else what name would you give it?

Judge Ferriss: Q. Would you call it "chopped meat," for instance?

A. I can give the name we use. We use a brand name. We designate it—we coined a new name for it, "Sosera."

The Court:

Q. What does that mean?

A. It means nothing except the identification of the product that we put on the market as a substitute for  
214 sausage.

Q. When you put it on the market what did you say on the box?

A. "Sausage, cereal and water;" "Sausage, water and cereal," no, I beg your pardon: "Meat, water and cereal."

Q. "Meat, water and cereal," you called what?

A. Sosera. There are other institutions have other names for it, but they are all brand names that are coined for distributing this product.

Q. Why not call it sausage?

A. The Government would not permit us to call it sausage.

Q. Why not?

A. I don't know. It is their regulation.

Q. Then you get around what the Government requires by giving it some other name? A. Yes, sir.

Q. But the people get it as sausage?

A. It is branded "Meat, water and cereal."

Q. Beef, water and cereal?

A. Meat products, water and cereal.

Judge Ferriss: Q. Has the Government any objection to that?

The Court: I am talking about the people.

Judge Ferriss: But here we are dealing with the—

The Witness: I might say in explanation, your Honor—

Judge Ferriss: Q. I understand—

The Court (To the Witness): Go on and state.



A. I might say in explanation of that, that the product is branded on each individual piece, until we come to small links, in which event it is marked on every four or  
 215 five links. It is marked on every piece of bologna until you get down to very small links. That branding is on them.

Q. That branding by the name you have given?

A. Not the brand name, but the ingredients "Meat, water and cereal."

Judge Ferriss: Q. Mr. O'Hern, in your experience as a practical sausage maker, handler and distributor of sausage, have you ever encountered any complaint or difficulty in the use of cereal on account of its not keeping as well as sausage made without it?

A. We haven't had that feature of it called to our attention.

Q. Has that question ever been raised? A. No, sir.

Q. A pure meat sausage has to be sold within a certain time, has it not?

A. Yes. All of it has limited keeping quality, of course.

Q. As far as your experience goes, the addition of cereal has cut no figure?

A. Not in the way we have used it in the—

Q. As a matter of fact, does it affect its keeping qualities injuriously?

A. We haven't found it so in the percentages we have used.

Q. What is the ordinary time within which the product reaches the consumer after it is out of the cooler?

A. We aim to get it to the consumer within a day or so after it is manufactured; in other words, we manufacture and ship the same day where possible, and always try to  
 216 anticipate our manufacture so as not have more than one day's supply ahead. We may go beyond that some, but our aim is to keep it as fresh as possible.

Q. In selling and handling sausages which have no cereal does the same degree of care have to be exercised in keeping them fresh?

A. Yes, with the exception of dry sausages.

Q. Is that true of other meats, is it true of loins and—

A. I believe it is more particularly true of those. The salt and the condiments added in the manufacture of sausage add to its keeping quality.

Q. You speak of spices and salt?

A. I speak of spices and salt.

Q. As a matter of fact, it keeps better than a prime cut would?

A. Yes, unless—I want to qualify that, unless the prime cut is cured.

Q. I am talking about the fresh meat, of course. I will ask you as a practical sausage man, without regard to any question as to whether it is necessary to use cereal to make a sausage—by the way, what is desirable, so far as the trade is concerned, and the table is concerned, as to the texture of the sausage, whether it should be dry or otherwise?

A. On frankfurters and bolognas, and products of that character, it is necessary to have a binding quality. A frankfurter should be juicy and to some extent pliable, so that it will bend without breaking or crumbling.

217 Q. Can you state to the Court what proportion of the added water to the product remains after treatment is completed and it is ready to go to the retailer? Is there any drying out of the moisture?

Mr. Woodward: What class of sausage?

A. I could best explain that in this way: That the amount of moisture, or water, added in the making up of the product and mixing of the product has no relative relation to the amount of water retained in the finished product. In other words, we add water to make this emulsion of the meat and the meat products that are added with the same idea that a housewife adds water in the kneading of dough. The amount of water she adds in the mixing of flour has no relative bearing to the amount of water retained in the baked bread.

Judge Ferriss: Q. Is it the universal practice to use water in the manufacture of sausage in the preparation of the dough?

A. Water or crushed ice are used, and in some instances where the meat contains an unusual quantity of water, of course, it would not be necessary, but in all other meats it would be.

Q. You were going to talk about the amount of water remaining in the finished product.

A. The amount of water remaining in the finished product is—there are various ways of expressing that: If you express it by taking the amount of water added, and including that in the percentage, there would be a decided shrinking. If you just took the meat content, or the solid content, of the  
218 ingredients entering into that manufactured from pure meat, it would vary from two or three per cent under the one hundred per cent or gross of the original meat entering into it, to two or three per cent over. I am referring now to bologna, frankfurters, and sausage of that character.

Q. Now I will ask you this question, Mr. O'Hern: Having regard to the appearance, the keeping qualities, the cooking qualities, the taste, and the cost to the consumer, is it proper and desirable to use cereal in some cases in excess of two per cent, and a corresponding amount of water?

A. In the first place, the use of cereal reduces the cost of the product to the dealer and to the consumer. The use of cereal adds to the conservation of the food or product in what may be termed the fried sausages, in that it retains the fat in those sausages that ordinarily runs off in the pan. It adds to the texture, appearance and the quality of the finished product in the utilization of cheaper, or what may be termed meat products, when they are worked up into sausage. It reduces the cost proportionately in the difference between the price of bull meat and the price of cereal, and that price reflects itself in the cost of the sausage. The cost of the sausage is determined by taking the products that have a value, used on a percentage basis, figuring them at their cost, basing it on the yield produced from the same, and adding to that the cost of manufacture, the cost of selling, and the profit desired.

Q. Does the consumer get the benefit of the cheapened cost? A. Absolutely.

219 The Court: Q. How is it with the manufacturer? He gets the benefit of it, too?

A. We get the same profit on that that he would get in the other. That product is manufactured to meet the competition, and to supply a demand for cheaper food.

Q. You make sausage and sell it in interstate commerce? You send it out of your state into another state?

A. Yes, sir.

Q. Have you a Government inspector at your place?

A. Yes, sir.

Q. In this sausage that you send out in interstate commerce do you use in excess of two per cent cereal and three per cent water? A. No, sir.

Q. But in the local trade in Chicago you use more cereal and more water? A. No, sir.

Q. You do not? A. No, sir.

Q. You use the same amount of cereal and the same amount of water in selling to the local trade that you do in selling to the trade outside of the city? A. Yes, sir.

Q. The same thing?

A. The Government regulations would not permit the manufacture of a sausage for local trade in an inspected establishment. They apply the same regulation to all products shipped locally, intrastate or interstate.

Q. How do you compete in the intrastate business with men who have not any Government inspection but are selling under the state law?

A. We either do not sell it, or they are permitted to sell it at a price that will be very close to what we have to sell our higher cost product.

220 Judge Ferriss: Q. When you say you do not use but two per cent cereal you are speaking with reference to the existing regulation? A. Yes, sir.

Q. Before that regulation when into effect did you use more than two per cent?

A. Yes, we used from three to eight per cent. We seldom used—

Q. I want to get clear on the record about this local situation; I understood you to say that the Government will not permit any uninspected product to go out of your factory?

A. No, sir.

Q. No matter whether it is for the local trade or where it goes? A. No, sir.

Q. And in order to escape Government inspection for your local trade you would have to have an entirely separate and independent establishment? A. Yes, sir.

Q. With all the paraphernalia, the refrigerators, and all the accessories that are necessary to the proper manufacture and keeping of sausage? A. Yes, sir.

Q. As a matter of practical business that would be impracticable? A. Yes, sir.

Judge Ferris: Mr. Bischoff testified to the same thing, if your Honor will remember.

The Court: Yes, I remember.

Judge Ferris: Q. What is your local business in Chicago? Do you have the same proportion that Mr. Mayer testified to?

A. Well, no. You mean our proportion of our local distribution?

221 Q. Are you in active competition with the local men in Chicago?

A. Not in Chicago; not to the extent that we were.

Q. Why is that?

A. We are not able to compete on the price.

Q. You are not able to compete with the uninspected product?

A. Numbers of them can undersell us on price.

The Court: Q. They use more cereal and more water and poorer meat?

A. I am not familiar with what they use, your Honor, but they are able to undersell us.

### Cross-Examination

By Mr. Woodward:

Q. You stated that they use a cereal in Germany: You referred then to potato flour, did you not?

A. I have no information as to potato flour. I have only the information as to cereal. Potato flour has been used, I understand, though we have not used it to any extent.

Q. Potato flour is not a cereal, is it?

A. Not according to my understanding.

Q. It has all the binding qualities, however, which you say a cereal possesses, has it not?

A. Not in my opinion.

Q. Will potato flour in the cold state in which you use it when manufacturing sausage, absorb water?

A. We haven't used potato flour; in fact, I have had no actual experience with potato flour.

Q. What kind of cereal have you used in your establishment? A. I understand it is corn cereal.

222 Q. Corn flour? A. Corn flour.

Q. You made one other statement: That the water added to a product had no relation to the finished product: You referred then to the class of smoked or cooked sausages, did you not? A. Yes, sir.

Q. I will ask you this question: Could you not take one hundred pounds of meat and smoke it, or cook it, and get the same approximate amount of finished product as you could by using seventy pounds of meat, ten pounds of cereal and twenty pounds of water?

A. I believe you would get very closely to the same yield, but you want to keep this much in mind: That the moisture content that the cereal absorbs has an influence there, and that the moisture content in the sausage made with cereal and meat is no greater on the whole than the moisture content of the sausage manufactured from meat alone.

Q. If that is true then where does the extra weight in the finished product come from? You have gotten the same amount from seventy pounds of meat and ten pounds of cereal as you got from one hundred pounds of meat.

A. You get it from the moisture. The moisture that you added bore the same relation to the finished product as the moisture that originally was in the meat. To make that clear and plain: The addition of water may be understood in cereal. It would be unpalatable to figure on using a dry cereal of any character in a product of that kind. The commercial prac-

223      tice today is to make a product that is ready for the table, in many instances. We add the moisture there to put it in condition for the table. We add that same amount of moisture and we aim to get the same amount of moisture there that is necessary to make the goods palatable and that will bear an approximate relation to the amount of moisture contained in the meat. In other words, the amount of solids in the sausage with meat, and the amount of solids of sausage made from meat and cereal, would be approximately the same.

Q. But in the second case which I gave you, in the finished product there is more water in proportion to the meat than there is in the other?

A. Undoubtedly so; just the same as there is in any cooked product. Just the same as there is in—

Q. I understood you to say that, but I want to get it straight in the record. A. Alright.

Q. Do you use cereal in summer sausage? A. No.

Q. Why not?

A. Under present regulations the percentage which we would be permitted to use would make no influence in a product of that character. It is a high grade product. Armour & Company for years have been making summer sausage and of late we have been working toward a high priced product, for the reason that the class of trade who can have that sausage appreciate—

Q. Did you use cereal in summer sausage before this regulation you speak of went into effect?

A. In some grades.

Q. Only in such grades as are intended for immediate sale?

A. We had some that were not sold immediately.

224      Q. But intended for sale within a very short time?

A. Whenever they were ready.

Q. You have never used cereal in the summer sausages which you put up during the winter to hold for quite a good length of time for sale, did you?

A. Well, if you could tell me what grade of sausage I might be able to answer it. I couldn't say as to what you have reference to. Now, we have made summer sausage in winter where that was sold in the spring and summer, that did contain cereal. We were making that, though, a cheap piece of goods to compete and to fill the wants for a cheaper product.

Q. What is the difference in the sale price of a frankfurter sausage which contains five per cent cereal and the necessary water to make a workable product, as compared with a frankfurter which contains no cereal?

A. Five per cent would be approximately 50 cents a hundred, or a half cent a pound.

Q. You refer now to the sale price?

A. I refer now to our sale price.

225 FRANK J. GARDNER, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the complainant in rebuttal, as follows:

#### Direct Examination

By Judge Ferriss:

Q. State your name, please. A. Frank J. Gardner.

Q. You live in Chicago? A. I do.

Q. What is your business?

A. I am connected with Swift & Company, packers.

Q. What is the business of Swift & Company?

A. Packers and manufacturers of various meat products.

Q. What is your relation to that business?

A. I act as officer in connection with the manufacture of the products, supervising superintendent, would, perhaps, cover the kind of work I do.

Q. Are you familiar with the different processes of manufacture, including sausage? A. Yes, sir.

Q. How long have you been connected with the manufacture of sausages? A. About fifteen years.

Q. With this same company? A. Yes, sir.

Q. Do Swift & Company do a large business?

A. Yes, sir.

Q. They sell all over the country? A. Yes, sir.

Q. They have packing plants, at different places?

A. Yes, sir.

Q. In supplying the eastern or distant markets do you supply them from the home plant in Chicago, or from the local plants?

226 A. They are supplied with sausage from local plants.

Q. You have a plant here in St. Louis? A. Yes, sir.

Q. And in other cities? A. Yes, sir.

Q. What was the practice of Swift & Company with regard to the use of cereal before this regulation went into effect?

Mr. Woodward: I desire to renew my objection on the ground that this is the case in chief and not rebuttal.

The Court: Proceed.

To which ruling of the Court the defendants, by their counsel, then and there, at the time, duly excepted.

The Court: It should have been put in [in] chief, but we will let it in now. Proceed.

A. They had used cereal in the manufacture of sausage ever since the beginning of my connection with that department.

Judge Ferriss: Q. Will you state approximately what percentages?

A. As much as six or eight per cent, I think, at times.

Q. And running from that down to the lowest?

A. To two per cent.

Q. What does the amount of cereal used depend upon, Mr. Gardner?

A. It depends chiefly, I think, on the cost of the sausage that it is desired to make.

Q. You mean by that—

A. To a certain extent it is used for a binder, but it is used very largely to make a cheaper product.

Q. Is there a demand for a cheap product in sausages?

A. There is.

227 Q. Where does that demand come from?

A. All over the country.

Q. What class of people, chiefly?

A. Chiefly from the cities and among the poorer class of people.

Q. Do you know whether workmen use sausage to any great extent?

The Court: We will admit that and let it go into the record; that is admitted, that they do use it and they are always anxious to get it just as cheap as they can. That may be admitted.

Judge Ferriss: Very well, then we will pass on.

Q. What other purposes are served by cereal?

A. It acts as a binder when used in connection with certain classes of meat.

Q. You heard Mr. O'Hern and Mr. Mayer testify on that subject? A. Yes, sir.

Q. Would you care to say whether you agree with their views, what they said as to their experience, or will you add anything to it?

A. Yes, I will agree to their statements.

Judge Ferriss: I ask this question, your Honor, so as to shorten the matter a little.

The Court: Yes.



Judge Ferriss: Q. You subscribe to what they said with regard to the advisability of using cereal. Without raising any question as far as necessity is concerned, I will ask you whether in your experience and observation it is a proper use to have cereal in sausages, having regard to the appearance, keeping quality, cooking qualities, taste, and cost of sausage? A. I so consider it, yes, sir.

Q. There has been a good deal said here about the keeping quality: What have you to say on that subject?

A. As a matter of trade practice—

Q. Yes, I want to get the practical experience.

A. I have found no material difference in the keeping quality of sausage made with cereal up to five or six per cent and sausage made without cereal. Both kinds will keep long enough to supply the trade, and, presumably, from the trade on to the consumer without serious complaint of spoiling.

Q. Is there any difference between the opportunity to sell spoiled sausage with cereal in it from that that has no cereal?

A. I should say not.

Q. All fresh sausages have to be sold before they are spoiled— A. Unquestionably.

Q. —in order to get the best advantage of them? That is true of all fresh meat, is it not, Mr. Gardner; it has to be sold within a reasonable time after it leaves the cooler?

A. Yes, sir.

Q. And the objection that is made to cereal could be made to the meat itself, so far as it is possible to keep it until it is spoiled?

A. Meat or fruit, or any class of wet food.

Q. Have you ever heard any complaint on the score of sausage not keeping on account of cereal and water in it?

A. We occasionally have had complaint of individual lots of sausage spoiling.

229 Q. What is that?

A. We have occasionally had complaints of individual lots of sausage spoiling.

Q. I understand, but have you had complaints based upon the presence of cereal and water? A. No, none.

Q. Has that question ever been raised??

A. Not to my knowledge.

Q. I suppose other cuts of meat spoil sometimes, do they not? A. Yes, sir.

Q. Any perishable article is liable to spoil? A. Yes, sir.

Q. Do Swift & Company comply with the regulation with regard to labeling? A. They do.

Q. Before this regulation went into effect and cereal was used in excess of two per cent, up, as you say, to six or eight per cent, what appeared on the label?

A. The labels were made to read "Sausage and cereal added," I believe.

Q. The word "cereal" appeared on the label?

A. Yes, sir.

Q. What is the practice about stamping the links of sausages themselves?

A. The large links are stamped with the words "Sausage, water and cereal"—

Q. Put right on the—

A. —or "Sausage and cereal added," according to the provisions of the regulation.

Q. And, of course, all labels, stencils and stamps have to be approved by the Government? A. They do.

Q. They have to pass inspection? A. Yes, sir.

Q. So whatever was done in that regard had the approval of the Government? A. Yes, sir.

230 Q. Do you still use cereal in excess of two per cent in other meat food products outside of sausage?

A. In some products, yes, sir.

Q. There is no objection to that on the part of the Government? A. No.

Q. Is the danger of decomposition just as great in other meat food products as it is in sausage?

A. Yes, I understand it so.

#### Cross-Examination

By Mr. Woodward:

Q. Would you say that same thing as to potted meats, or deviled meats?

A. Potted meats being closed in tin and sterilized keep as canned meats do, and the same statement would not apply to that class of meats. Deviled meats are so much more highly seasoned and the seasoning increases the keeping quality.

Q. What do you pay for cereal?

A. I don't buy the cereal, but I understand it cost around two or three cents a pound.

Q. Are you familiar with the prices at which your goods are sold?

A. In a very general way. I don't sell any of the goods, or make the prices.

Q. What is the difference between a frankfurter containing five per cent cereal and a frankfurter containing no cereal?

A. I couldn't answer you in terms of money.

Q. You cannot? A. No.

Q. Do you know anything about the difference in cost?

231 Q. I know there is a difference in cost. I know that the cost of each kind of sausage is arrived at by taking the cost of all of the elements, adding them together and dividing by the weight of the finished product. That is equally true with sausage containing cereal and water, and all the higher priced meats.

Q. The labor and overhead charges on both kinds of sausage would be the same?

A. That would be included.

Q. In a great many places you compete with local organizations, do you not?

A. We do business in the same territory.

The Court: The more cereal and water you add the less meat you have, is that it? A. Yes, sir.

Q. That is done for the purpose of cheapening the product that you sell, not only to the trade but to yourselves, is that so? A. Yes, sir.

Q. And you put it in for the purpose of cheapening it?

A. Yes, sir.

Q. You say you have used it up to five or six per cent; What is the objection to using it up to as high as ten per cent of cereal and twenty per cent of water, if any?

A. None, if that suits the trade; if that makes a sausage product which people will buy and eat.

Q. Suppose you increased it and make it twenty per cent and forty per cent water: Would that make it the same sort of sausage the other was?

A. The same thing; one of the most palatable pieces of sausage I ever ate in my life had so much cereal in that it was perfectly apparent to the taste.

232 Q. Why do you not make it that way instead of putting any meat in it at all, if it is so delicious?

A. The addition of the portion of meat adds to the flavor and makes it a more desirable food.

Q. You think a working man wanting meat would be just as well off by eating cereal and water, is that it?

A. No, sir.

Q. You cannot tell the difference between a sausage containing 2 per cent of cereal and a sausage containing no cereal by looking at it, can you?

A. I couldn't say definitely as to that particular proportion.

Q. But when you get up into quite a good deal larger proportion you can tell it by looking at it?

A. Yes, sir.

233 PAUL RUDNICK, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the complainant in rebuttal, as follows:

Direct Examination

By Judge Ferriss:

Q. What is your name? A. Paul Rudnick.

Q. And your profession? A. I am a chemist.

Q. Where do you live? A. In Chicago.

Q. Are you connected with any concern there?

A. I am associated with Armour & Company.

Q. You are chemist for Armour & Company?

A. Yes, sir.

Q. By "Armour & Company" you mean the packers?

A. The meat packers, yes, sir.

Q. Have you had occasion to make a study of the composition of sausages and other meat food products?

A. I have had.

Q. Are you able to testify as an expert on the subject of the keeping quality of sausage with cereal and water added?

A. I have made a series of tests.

Q. Have you made a study of that subject? A. Yes, sir.

Q. I will ask you what is the normal amount of water in the average beef, lean beef, or how does it compare with the human body?

A. The amount of moisture or water in the carcass of beef is about the same as that in the human body.

Q. About how would it run?

A. About 60 per cent, 65 per cent.

Q. Sixty-five per cent?

A. About that; about two-thirds, in round numbers.

234 Q. Two-thirds of the animal is water?

A. Yes, sir.

Q. Does that vary in different animals depending on what?

A. I don't know just what it depends on, but it does vary.

Q. Generally speaking, lean meat has more moisture than fat meat? A. Absolutely.

Q. Fat does not retain much moisture?

A. Very little.

Q. Fresh meat, we all know, will in time deteriorate and decompose? A. Yes, sir.

Q. What is that due to? A. Bacterial action.

Q. It is due to bacterial action? A. Yes, sir.

Q. Is the bacterial action as active in a dry meat as it is in a wet meat? A. It is not.

Q. You know that they dry meat in certain climates out in the air? A. Oh, yes.

Q. How is that made possible?

A. The bacterial action is retarded, if not almost entirely stopped, by the absence of moisture.

Q. Then the presence of moisture is a necessary condition for bacterial action?

A. It is exactly as in the case of every other living body.

Q. Coming back to the subject of meat: At what point would you fix the moisture that would be a favorable condition for bacterial action, what degree of moisture?

A. Well, I should say anything above fifteen or twenty per cent of moisture.

235 Q. When you get above fifteen or twenty per cent of moisture then you meet a condition that is favorable to bacterial action? A. You do.

Q. If meat is left in that condition without arresting that action by cooling it, or otherwise, decomposition will ensue?

A. It will.

Q. Then according to that the natural meat of an animal having, as you say, 65 per cent, is normal above that point of safety? A. Far above that.

Q. And unless arrested decomposition will presently set in? A. It will.

Q. That is why fresh meat spoils in a short time, depending on the temperature? A. That is the reason.

Q. It is arrested by keeping it in the ice box, or in a cooler?

A. Yes, sir.

Q. After you reach this point of favorable condition for bacterial action, say 15, 20, or 25 per cent—I believe one of the Government witnesses fixed a point of 25 per cent, somewhere along there: at all events, it is well within the natural amount of moisture of the animal—if you have reached that point what effect on the increased bacterial action does the addition of water have? A. No material effect.

Q. No material effect? A. No, sir.

Q. That is to say, after you have reached the 20 or 25 per cent of moisture, to increase the moisture beyond that does not add materially to the bacterial action?

A. Not materially.

236 Q. And would not affect the keeping quality of the meat? A. Not to any material extent.

Q. Then if it is true that the meat as a natural meat has 65 per cent of moisture, the danger point, we will call it, for bacterial action being 20 per cent, the addition of moisture, whether in connection with the meat itself, or with cereal, would not materially increase the bacterial action?

A. That is substantially the case.

Q. That being true, and knowing that to fresh meat containing, as you say, 65 per cent of water, there is added five,

six, eight, or ten per cent of cereal with added water, double the amount of water, we will say, would that have a tendency to increase the bacterial action?

A. There would be no substantial tendency.

Q. I will ask you to state whether, in your judgment, a sausage composed of meats, spices, and cereal not exceeding ten per cent (as that is the only amount that has been discussed here) will keep as well as sausage without the cereal and added water?

A. Within the limit where any product with that amount of moisture would spoil, within those limits, it will keep practically as well.

Q. I suppose a pure fresh meat sausage, without any cereal, would spoil in a comparatively short time?

A. It will.

Q. It has to be sold before this bacterial action sets in, or becomes effective?

A. Yes. Spoiling depends entirely on the conditions under which it is kept.

237 Q. You heard Mr. Price and Mr. Robinson testify this morning about the effect of the use of cereal and water on the digestibility of the product: Did you hear their testimony? A. Yes, I did.

Q. Do you agree with their conclusion, or have you anything to say on that subject? Can you say anything?

A. I cannot say anything except my opinion in the matter.

Q. What is that?

A. I can't give you anything except my opinion in the matter.

Q. That is all they gave.

A. I should not consider that the addition of cereal to sausage would affect the digestibility to any material, to any to any substantial, noticeable extent.

Q. Will you not state as well as you can what the grounds are on which you base that opinion?

A. Mainly, information derived, the general impression derived from a perusal of the study of literature published from time to time, both by the experts in this country as well as abroad; in Germany, particularly. The works of various experts on that subject have come to my notice from time to time and I obtained a general idea in that way.

Q. Those gentlemen stated that the use of cereal prolonged digestion: Even if that were true, does it follow because one article digests more slowly than another that it is any less wholesome?

A. Not in my opinion, but that is within reasonable limits, of course.

238 Q. Mr. Robinson testified that in his opinion a sausage with cereal and water added was in some respects, or in part, I think he put it, unwholesome: I will ask you whether in your opinion a sausage with cereal added up to six or eight or ten per cent, with a proportion of water, is a wholesome article of food?

A. It most emphatically is, in my opinion.

Q. Does the human system require the elements which are in both? A. It surely does.

At this point recess was had until two o'clock in the afternoon.

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After recess on Saturday, January 29, 1916, at two o'clock in the afternoon the following proceedings were had:

Direct Examination of Mr. Paul Rudnick, resumed,

By Judge Ferriss:

Q. Do you know this book I read from yesterday "Oster-tag's Handbook of Meat Inspection?" A. I do.

Q. I will get you to state whether it is regarded as an authority? A. It is regarded so.

Q. Do you know the gentleman who wrote this preface, John H. Mohler? A. I do.

Q. Who is he?

A. He is now the Assistant Chief of the Bureau of Animal Industry.

Q. In Washington? A. In Washington.

239 Cross-Examination

By Mr. Woodward:

Q. Do you consider raw starch as easily digestible as cooked starch? A. No.

Q. Raw starch is harder to digest, is it not?

A. I consider it so.

Q. It is practically impossible to digest unless the starch grains are broken in some way?

A. No, that is not true.

Q. You have stated that after you had about fifteen or twenty per cent of moisture in a meat then bacterial action sets in?

A. No. The conditions for bacterial action are then—that is, the conditions are then favorable to bacterial action.

Q. However, if you should add starch to that meat, the moisture from that meat would tend to make the starch ferment, would it not?

A. Under certain conditions, yes, sir.

Q. So that even though the meat itself might not spoil, still the tendency by adding the starch and creating a condition from which fermentation might set up might cause a tendency to spoil, might it not?

A. Eventually, but no sooner than in the presence of meat.

Q. Do you mean to say, then, that the fact that the starch, when moisture is present, will ferment, will not cause the meat to spoil any quicker than meat would spoil by itself?

A. I mean to say—I am speaking now of cereal such as is used in sausage—will not ferment any sooner than the meat will spoil.

240 Q. Did you ever conduct any experiments along that line? A. I did.

Q. What were those experiments?

A. I conducted a set of comparative tests in which I mixed pork in one case; beef in another case, and cereal, as the third test; mixed them with water to a pasty condition similar to that which obtains in the sausage mass before it is stuffed, and in each instance the cereal did not ferment, start to ferment or sour as soon as the meat started to decompose.

Q. You did not compare an article, then, which had no cereal present, with an article which had cereal present?

A. I did that also.

Q. You qualified as a chemist, I believe: Are you a bacteriologist in addition?

A. I have been more or less interested in bacteriology for the last fifteen years.

Q. Are you a plain garden variety chemist, or a physiological chemist?

A. Well, I have been in touch with physiological chemistry for that length of time. It is all involved in packing house chemistry.

Q. Is it not a fact that the food value of a product which contains cereal and added water is lower than that of the product which does not?

The Court: That may be admitted. It has been proved here two or three times that the value of it on the market is less when it has cereal and water in it than it is when it is all meat, for the reason that cereal and water cost less than meat. For that reason this sausage is made and sold cheaper.

241 Mr. Woodward: Q. Are you familiar with the product known as farina?

A. I don't think so.

Q. It is a cereal product. Did you ever try cooking some of that and letting it stand to see how soon it would spoil?



A. I did not.

Q. Do you not know from your experience that if you would cook such a product and permit it to stand over night it would be sour by morning?

A. Not from my experience, no.

Q. In what part of the body does starch digest?

A. Mainly in the small intestines just below the stomach. Also, to a certain extent, it is pre-digested in the stomach in the presence—that is due to the saliva with which it is mixed in chewing.

Q. In other words, a large part of it takes place in the mouth?

A. I would not say that, no, not a large part of it.

242 H. S. GRINDLEY, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the complainant in rebuttal, as follows:

#### Direct Examination

By Judge Ferriss:

Q. State your name, please? A. H. S. Grindley.

Q. Where do you live, Mr. Grindley?

A. Urbana, Illinois.

Q. What is your profession?

A. I am Professor of Animal Nutrition in the University of Illinois.

Q. Is that located at that point? A. Yes, sir.

Q. What training have you had in your specialty?

A. I graduated from the University of Illinois in 1888 with the degree of Bachelor of Science, and from Harvard University in 1894, as Doctor of Science.

Q. What have you been doing since that time?

A. Since that time I have been teaching chemistry, or animal nutrition, and investigating problems relating to animal nutrition.

Q. Have you made any investigations into the chemistry and nutritive value of meats and meat products?

A. Yes, I have.

Q. Have you published any works?

A. Yes, sir, I have.

Q. What?

A. I published a number of bulletins and papers on the composition and nutritive value of meats and meat products.

Q. Do you regard yourself as an expert in your line?

A. Yes, in certain directions.

243 Q. What is the natural moisture of meat?

A. It varies widely, from as low as thirty per cent to as high as eighty per cent.

Q. What would you say would be the average?

A. I would say about sixty to sixty-five per cent; somewhere between sixty and sixty-five per cent would be the average for different kinds of beef, for instance.

Q. What is the decomposition or spoiling of meat due to, what is the immediate cause?

A. Primarily to bacterial action.

Q. Does that bacterial action require moisture?

A. Yes, sir.

Q. At what point, what degree of moisture would present a favorable condition for bacterial action?

A. Well, that would vary with conditions, but anywhere from fifteen to thirty per cent of moisture would be sufficient to favor bacterial action.

Q. At what point would you say it was most favorable for bacterial action?

A. That would depend largely upon conditions. I should say that thirty per cent was quite favorable for bacterial action under ordinary conditions.

Q. It would be, then, within the natural content, or moisture content of meat?

A. Yes, it would be below the natural content of meat.

Q. Will fresh meat when exposed become favorable to bacterial action? A. Yes, sir.

Q. Has it normally enough fluid or moisture in it to present that condition? A. Yes, sir.

Q. If you increase the moisture content beyond the twenty, twenty-five or thirty per cent, does that materially increase the bacterial action? A. Not significantly.

Q. If you add to the meat additional water, inasmuch as you have enough water in the meat anyway to produce bacterial action, does that added water materially increase bacterial action? A. Not materially.

Q. Would it make any difference if in connection with that added water there was also added to the meat corn flour?

A. I don't think that that would significantly increase the susceptibility to decomposition.

Q. I suppose, Professor, that all fresh meat is liable to decompose if it is kept too long? A. Certainly.

Q. I will ask you whether, as a matter of practical experience, sausage with cereal up to six, or eight, or even ten per cent, will keep as well as the meat sausage without the cereal, so far as the bacterial action is concerned?

A. I see no reason why it should not.

Q. Professor, have you made any study of the subject of the digestibility of food? A. Yes, sir.

Q. I will get you to state what the relation is, if any, between the digestibility, of a food and its wholesomeness?

A. A food must be digested before it can be utilized by the body, but even if a food is only slightly digestible, or medium digestible, it does not necessarily mean that it is unwholesome or unsound.

245 Q. What becomes of the undigested food?

A. It is excreted.

Q. What is that?

A. It is excreted; it is given out; it passes away from the body.

Q. Is there any relation between what is called a slow digestion and the wholesomeness of food?

A. Not necessarily.

Q. Is it the fact that different foods vary in the time required for digestion? A. Yes, sir.

Q. Are the foods which require a long time for digestion comparatively any less wholesome on that account?

A. Not necessarily.

Q. Would you say that corn meal, water and meat prepared as in sausage, is in any sense unwholesome?

A. In my opinion it is not unwholesome.

Q. Why not? Give your reasons, if you please.

A. Because the products there, if digested in the body by man or the lower animals, is beneficial to health. That is, all of the products can be digested and they can be utilized by the animal body for its growth, and for the production of energy, and the production of work.

Q. What function do cereals perform as food? To be more specific, take corn meal: That is what we are talking about.

A. The predominant nutrient or constituent in corn meal is starch, and the chief office of starch in nutrition is to give energy, and also to produce fat in the animal body.

Q. Are those elements essential to the proper condition of the human body?

246 A. Yes, sir; that is, the human body, the animal body, must produce from its food, energy.

Q. Is it essential to a healthful body that there should be a proper supply of starch, or—

A. A certain amount of starch is necessary.

Q. What are carbo-hydrates, where do they come from?

A. Carbo-hydrates is a general term, and starch is a member of that family.

Q. Starch furnishes carbo-hydrates? A. Yes, sir.

Q. And carbo-hydrates furnish and aid energy?

A. Yes, sir.

Q. Meat contains a large element of what is called protein?

A. Yes, sir.

Q. And has no carbo-hydrates, is that true?

A. Only a trace of carbo-hydrates, a small quantity.

Q. So that meat alone would not supply the necessary elements which are supplied by starch? A. No, sir.

Q. It would not supply sufficient carbo-hydrates?

A. No, sir.

Q. What does meat supply?

A. Meat supplies the protein, fats, and mineral matters.

Q. What is the office of the protein?

A. It serves, first, to build up the muscular tissue of the body. In the second place, it furnishes energy to the body like carbo-hydrates or fats do.

Q. Will meat alone furnish sufficient heat and energy, or supply the place of carbo-hydrates?

A. The animal body will not work properly unless it also has with its food some carbo-hydrates. The human body cannot properly, in the long run, utilize proteins unless there are some carbo-hydrates present.

Q. The office of the protein in meat is to build up muscular tissue? A. That is one office, yes, sir.

Q. That is the main purpose, is it not?

A. Yes, it is the most important purpose.

Q. Is there any question as to whether corn flour is a wholesome food in itself? A. None whatever.

Q. It is very largely used? A. Yes, sir.

Q. Is there any question in your judgment as to whether corn flour, in combination with meat, is a wholesome food?

A. None whatever.

Q. Or in combination with meat and water?

A. None whatever.

Q. Are you familiar with this work of Ostertag's—

A. Yes, sir.

Q. —Handbook of Meat Inspection? A. Yes, sir.

Q. Do you know whether it is regarded as an authority?

A. Yes, it is regarded as an authority.

Mr. Woodward: We will admit it is an authority, and you may use any part that you want to in arguing the case.

#### Cross-Examination

By Mr. Woodward:

Q. Fats are carbo-hydrates, are they not, Mr. Grindley?

A. No, sir.

Q. What do you say a carbo-hydrate is?

A. Carbo-hydrates is a class of organic substances which contain carbon, hydrogen and oxygen.

Q. Is not fat such a substance?

A. It is such a substance that it contains carbon, hydrogen and oxygen, but all substances that contain carbon, hydrogen and oxygen are not carbo-hydrates.

Q. In your opinion, would a substance which was hard to digest if used continually impair digestion and impair the digestive system? A. It might, yes; it might.

Q. Starch in its, what I will call "raw state," is not easily digestible, is it?

A. Not as readily as if it is cooked. It is digestible all right.

Q. In order to break up the starch grains you have to heat it to 212, I believe? A. That helps, yes, sir.

Q. Are you familiar with the action of starch when water is brought in association with it?

A. To some extent, yes, sir.

Q. It ferments very rapidly, does it not?

A. It will ferment under those conditions at proper temperature moisture, and so forth.

Q. Would you say that starch, when water is added, will ferment more quickly than meat with water present in it will spoil?

A. I would not say that it did, no, sir, I couldn't say that. In fact, I don't believe it does, because, take ordinary bread: It contains thirty to forty-five per cent of water, and we know well enough that you can leave a loaf of bread in our house, or kitchen, and stand—

249 Q. That is cooked starch.

A. That is true, it is cooked starch.

Q. I am talking about raw starch: That will ferment very quickly, will it not?

A. It will ferment. I would not say it will—that it would undergo bacterial action quicker than meat. Meat is very susceptible to decomposition.

Q. Answer this question, then: Is it not a fact that raw starch to which water has been added will ferment in twenty-four hours? A. That would depend upon the conditions.

Q. With the ordinary room temperature, Mr. Grindley.

A. I would not say that it would.

Q. Do you know whether it will or not?

A. I don't know that it would.

Q. You do not know how quickly raw starch will ferment, then? A. Not under those conditions.

Q. Cereal is not a muscle building food, is it, Mr. Grindley?

A. Yes, it will build muscle. Cereal will build muscle.

Q. As compared with meat, is it as good a muscle building food?

A. No, sir. Cereals do not contain as much protein as meats, and therefore it is not as valuable for building muscle as meats are.

The Court (To Mr. Woodward): I do not think you are aiding me any by this examination.

Mr. Woodward: You testified in a similar case to this in the State of Michigan, did you not, Mr. Grindley?

A. Yes, sir.

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250 GUSTAV BISCHOFF, recalled, testified on behalf of the complainant in rebuttal, as follows:

Direct Examination

By Judge Ferriss:

Q. It is possible that I asked this question, but I do not recall it: I want to know whether in your experience in manufacturing, handling and selling sausages to the trade, you have had any complaints on the ground that the sausages did not keep well on account of cereal in them.

A. None whatever.

Q. Has that question ever been raised at all?

A. Never with me.

Q. In your experience? A. No, sir.

Judge Ferriss: That is our case, your Honor.

At this point adjournment was had to Monday, January 31, 1916, at ten o'clock in the forenoon.

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251 Saint Louis, January 31, 1916.

Met pursuant to adjournment as above on Monday, January 31, 1916, at ten o'clock in the forenoon.

Present: Same parties as heretofore.

The following proceedings were had:

Closing arguments were made by counsel for the respective parties, at the conclusion of which the Court stated he would take whatever memoranda of authorities counsel wished to submit, and would announce his decision later.

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It Is Stipulated between the parties that the complainant's exhibits need not be printed as a part of the record, but that the originals may be used in the presentation of the case in the Court of Appeals to such extent and for such purpose as either party may desire.

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## (Certificate of Judge to Bill of Exceptions, etc.)

Forasmuch, as said matters do not appear of record herein, the Complainant, St. Louis Independent Packing Company, has prepared and now presents this its Bill of Exceptions, and prays that the same may be signed, sealed and made a part of the record, which is accordingly done on this 30th day of March, 1916.

(Seal)

(Signed) DAVID P. DYER,  
Judge, District Court of the United  
States, Eastern Division of the  
Eastern Judicial District of Mis-  
souri.

The foregoing Bill of Exceptions —has been examined and  
is hereby approved by

W. H. WOODWARD,  
Attorney for Defendants.

252 (Certificate of Reporter to Transcript of the  
Evidence.)

I, Mildred J. Cook, having been on the 28th day of January, 1916, appointed by the Court to act as stenographer in reporting the evidence and proceedings had in this cause, do hereby certify that the foregoing is a full true and complete type-written transcript from my stenographic notes, including all of the proceedings and documentary exhibits offered in evidence at the hearing of this cause, No. 4156, pending in the United States District Court of the Eastern Division of the Eastern Judicial District of Missouri, wherein St. Louis Independent Packing Company is complainant, and Hon. David F. Houston, Sec. of Agriculture, et al., are defendants, before the Honorable David P. Dyer, Judge of said District Court, in the United States Courtroom, Custom House Building, City of St. Louis, Missouri.

MILDRED J. COOK.

253

(Complainant's Exhibit B.)

(being slip of paper with following written on same.)

Sausage and Cereals,

Establishment 166-A.

U. S. Inspected and Passed by  
Department of Agriculture.

Complt's. Exhibit B 1/28/1916.

M. J. C.

(Complainant's Exhibit C.)

(Being piece of paper with following stamped and written on same.)

166-A

U. S.

Insp'd. & P'S'D.

166-A

U. S.

Insp'd. & P'S'D.

U. S. INS'P. & PSD.

166 A

Cereal Added.

166-A

U. S.

Insp'd. & P'S'D.

Complainant's Exhibit C.

1/28/1916, M. J. C.

Endorsed: "Filed March 31st, 1916. W. W. Nall, Clerk."

254 And Afterwards, to-wit on the 7th day of April, 1916, there was filed in said cause, Stipulation, Petition for Appeal, Order granting Appeal, Assignment of Errors, Appeal Bond, and Praeceptum for Transcript, which are respectively in words and figures as follows, to-wit:

(Stipulation as to Separate Answer of the Defendant,  
James J. Brougham.)

It is stipulated between the parties to the above entitled cause that the separate answer of James J. Brougham filed Nov. 30, 1914, is the same in tenor and effect as the separate answer of David F. Houston, excepting that the last paragraph of the answer of said Houston is not contained in the answer of said Brougham.

W. H. WOODWARD,  
Attorney for Defendants,  
Houston & Brougham.

FRANKLIN FERRISS,  
Atty. for Plaintiff.

Endorsed: "Filed Apr. 7, 1916. W. W. Nall, Clerk."



## 255 Petition for Appeal.

The above named complainant, St. Louis Independent Packing Company, conceiving itself aggrieved by the final judgment entered on March 20, 1916, in the above entitled proceeding, dismissing complainant's bill, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit, and prays that this its appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was entered, duly authenticated, may be sent to the said Circuit Court of Appeals for the Eighth Circuit.

ST. LOUIS INDEPENDENT  
PACKING COMPANY,

By Franklin Ferriss,  
Its Solicitor.

Endorsed: "Filed Apr. 7, 1916. W. W. Nall, Clerk."

## 256 (Order allowing Appeal.)

Now comes the complainant in the above entitled cause by its solicitor, and files and presents to the Court its assignment of errors and its petition for an appeal from the final judgment dismissing its bill of complaint, rendered herein on March 20th, 1916, to the United States Circuit Court of Appeals for the Eighth Circuit; on due consideration whereof it is

Ordered that said appeal be granted as prayed.

(Signed) DAVID P. DYER,  
Judge.

Endorsed: "Filed Apr. 7, 1916, W. W. Nall, Clerk."

## 257 Assignment of Errors.

Now comes the complainant, St. Louis Independent Packing Company, by Franklin Ferriss, its solicitor, and respectfully represents that it feels itself aggrieved by the judgment entered by the United States District Court in the above entitled cause on March 20, 1916, dismissing complainant's bill of complaint, and assigns the following errors therein and thereto, to-wit:

First. The Court erred in finding that the Secretary of Agriculture has determined that the use of cereal in excess of two per cent and water in excess of three per cent in the manufacture of sausage renders the product unwholesome.

Second. The Court erred in holding that, even if the Secretary of Agriculture has failed to find as a fact that the product in question is unwholesome, still it is the duty of the Court to determine whether the product containing more than two per cent cereal and three per cent water is in fact a wholesome food product under the bill and answer from all the evidence in the case.

Third. That the Court erred in finding that upon the evidence the use of cereal in excess of two per cent and water in excess of three per cent in the manufacture of sausage renders the product unwholesome.

258 Fourth. The Court erred in finding that the product called "sausage" containing more than two per cent cereal and three per cent water is "a much inferior and cheaper product."

Fifth. The Court erred in holding that "the regulations promulgated by the Secretary in 1914 were within his province to make in determining the question as to whether the product of more than two per cent of cereal and three per cent of water rendered such product unwholesome and unfit for food."

Sixth. The Court erred in holding that "the evidence in the case without regard to the regulations satisfies the Court that upon the issues joined the finding must be for the defendants."

Seventh. The Court erred in sustaining the validity of the regulation of the Secretary of Agriculture forbidding the use of cereal in excess of two per cent and water in excess of three per cent in the manufacture of sausage.

Eighth. The Court erred in holding that the inspector was authorized to refuse to mark as inspected and passed the sausage manufactured by complainant on the ground that it contained cereal in excess of two per cent and water in excess of three per cent.

Ninth. The Court erred in holding that the regulations promulgated in 1914 are different in effect from the regulations promulgated in 1913 with preamble as set out in the bill of complaint.

Tenth. The Court erred in dismissing the bill.

Eleventh. The Court erred in not granting complainant a permanent injunction. Wherefore appellant prays for a re-

versal of the decree rendered herein and the entry of a decree in conformity with the prayer of the bill of complaint.

ST. LOUIS INDEPENDENT  
PACKING COMPANY,

By Franklin Ferriss,  
Its Solicitor.

Endorsed: "Filed Apr. 7, 1916, W. W. Nall, Clerk."

259

(Bond on Appeal.)

Know All Men By These Presents, That we, St. Louis Independent Packing Company and Gus Bischoff, Jr. are held and firmly bound unto David F. Houston, A. D. Melvin and James J. Brougham in the full and just sum of \$500.00 to be paid to said David F. Houston, A. D. Melvin and James J. Brougham, their heirs, executors, administrators, successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors or assigns, jointly and severally by these presents.

Scaled with our seals and dated this 23d day of March in the year of our Lord Nineteen hundred and sixteen.

Whereas lately at the March Term 1916 of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, in a suit pending in said court between St. Louis Independent Packing Company, plaintiff, and David F. Houston, Secretary of Agriculture, A. D. Melvin, Chief of the Bureau of Animal Industry of the Department of Agriculture, and James J. Brougham, Chief Inspector of the Bureau of Animal Industry of the Department of Agriculture, defendants, a final judgment was rendered in favor of the defendants [in favor of the defendants] David F. Houston, A.

D. Melvin and James J. Brougham and against the St. Louis Independent Packing Company, dismissing its bill of complaint, and the said St. Louis Independent Packing Company has obtained an appeal from the said Court to the United States Circuit Court of Appeals for the Eighth Circuit, to reverse the said judgment.

Now the condition of the above obligation is such that if the St. Louis Independent Packing Company, shall prosecute said appeal to effect and answer all damages and costs if it

fails to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

ST. LOUIS INDEPENDENT  
PACKING COMPANY,

(Seal) By F. H. W. Krenning, Secy.  
(Seal) GUS BISCHOFF, Jr.

Approved by (Signed) David P. Dyer, Judge.

Endorsed: "Filed, Apr. 7, 1916, W. W. Nall, Clerk."

261 Praecepte for Transcript and Election as to Printing.

To the Clerk of said Court and the Solicitors for Defendants.

The complainant in the above entitled cause submits the following statement of what it desires printed as a sufficient and complete record upon which to submit the above entitled cause on the appeal thereof in the United States Circuit Court of Appeals for the Eighth Circuit and elects to have the record in said cause printed by and under the supervision of the Clerk of the United States Circuit Court of Appeals, under the rules thereof.

The parts of the record complainant (appellant) deems necessary and desires to have printed are the following:

The bill of complaint.

Order denying temporary injunction.

Mandate of Court of Appeals.

Separate answer of Hon. David F. Houston.

Stipulation as to answer of James J. Brougham.

Bill of Exceptions.

Opinion of Judge Dyer and decree dismissing bill.

262 Petition for appeal and order granting same.

Assignment of errors.

Appeal bond and approval and filing.

Citation.

This praecipe.

Respectfully,

FRANKLIN FERRISS,  
Solicitor for Complainant,  
(Appellant.)

Service of copy of within Praecepte is hereby acknowledged  
this .... day of .....1916.

W. H. WOODWARD,  
Solicitor for Defendants.  
(Appellees).

Endorsed: "Filed Apr. 7, 1916, W. W. Nall, Clerk."

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263 (Order approving Bond on Appeal, etc. April 7, 1916.)

Now at this day comes the said complainant by its solicitor and presents to the Court its bond upon the appeal this day granted to the United States Circuit Court of Appeals for the Eighth Circuit, upon due consideration whereof the Court doth approve said bond; and now a citation citing and admonishing the said defendants Houston and Brougham to appear before the said Court of Appeals within sixty days from this date is signed by the Judge, service acknowledged and filed.

Stipulation and praecipe for transcript filed.

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264 (Clerk's Certificate to Transcript.)

United States of America,  
Eastern Division of the Eastern  
Judicial District of Missouri—ss.

In the District Court of the United States, Within and for  
the Eastern Division of the Eastern Judicial District  
of Missouri.

I, W. W. Nall, Clerk of the District Court of the United States, within and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in cause No. 4156, of St. Louis Independent Packing Company, Complainant vs. Honorable David F. Houston, Secretary of Agriculture, A. D. Melvin, Chief of the Bureau of Animal Industry of the Department of Agriculture, and James J. Brougham, Chief Inspector of the Bureau of Animal Industry of the Department of Agriculture, Defendants, together with all things of and concerning the same (save as restricted by the praecipe for

transcript hereinbefore set forth as fully as the same remains on file and of record in said cause in my office, and that the original Citation is hereto attached and herewith returned.

In Witness Whereof, I hereunto set my hand and affix the seal of said District Court, at office, in the City of St. Louis, in said Division and District this 14th day of April, A. D. 1916.

Seal  
U. S. Dist. Court  
Eastern Divi. of  
East. Judicial Dist.  
of Missouri.

Documentary  
Stamp  
Canceled  
April 14, 1916.

W. W. NALL,  
Clerk.

By Otto O. Fickeissen,  
Deputy Clerk.

Filed Apr. 14, 1916, John D. Jordan, Clerk.

168 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

*Appearance of counsel for appellant.*

United States Circuit Court of Appeals. Eighth Circuit.

ST. LOUIS INDEPENDENT PACKING COMPANY, APPEL-	} No. 4692.
lant,	
<i>vs.</i>	
HON. DAVID F. HOUSTON, SECRETARY OF AGRICUL-	
ture, et al.	

The clerk will enter my appearance as counsel for the appellant.

FRANKLIN FERRISS,  
*Rialto Bldg., St. Louis, Mo.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 11, 1916.

*Appearance of counsel for appellees.*

The clerk will enter my appearance as counsel for the appellees.

ARTHUR L. OLIVER,  
*U. S. Atty.,*  
W. H. WOODWARD,  
*Asst. U. S. Atty., 330 Custom House, St. Louis, Mo.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 10, 1916.

169 *Order of argument.*

December term, 1916. Monday, December 11, 1916.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Franklin Ferriss for appellant; and the hour for adjournment having arrived, further argument is postponed until to-morrow.

*Order of submission.*

December term, 1916. Tuesday, December 12, 1916.

This cause having now been called for further hearing, argument was resumed by Mr. Franklin Ferriss for appellant, continued by Mr. W. H. Woodward for appellees, and concluded by Mr. Franklin Ferriss for appellant.

Thereupon this cause was submitted to the court on the transcript of the record from said district court and the briefs of counsel filed herein.

*Opinion.*

United States Circuit Court of Appeals. Eighth Circuit.

No. 4692.—May Term A. D. 1917.

ST. LOUIS INDEPENDENT PACKING COMPANY,	Appeal from the Dis-
a Corporation, appellant.	trict Court of the
<i>vs.</i>	United States for
HONORABLE DAVID F. HOUSTON, SECRETARY	the Eastern Dis-
of Agriculture, et al., appellees.	trict of Missouri.

Mr. Franklin Ferriss (Mr. A. B. Stratton on the brief), for appellant.

Mr. W. H. Woodward, assistant United States attorney (Mr. Arthur L. Oliver, United States attorney, on the brief), for appellees. Before Sanborn and Smith, circuit judges, and Amidon, district judge.

Smith, circuit judge, delivered the opinion of the court.

This suit was brought to obtain a temporary and permanent injunction.

"Restraining Honorable David F. Houston, Secretary of Agriculture, Doctor A. D. Melvin, chief of the Bureau of Animal Industry, and James J. Brougham, chief inspector of the Bureau of Animal Industry of the Department of Agriculture at St. Louis, and their and each of their assistants, deputies, inspectors, employes, representatives, and clerks, from refusing to mark, stamp, tag, or label as 'inspected and passed' all meat food products or sausage manufactured by your orator found to be sound, healthful, and wholesome and which contain no dyes, chemicals, preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome, or unfit for human food," and that a mandatory injunction issue requiring the defendants to:

"mark, stamp, tag, or label as 'inspected and passed' all the meat food products or sausage manufactured by your orator found to be sound, healthful, and wholesome and which contain no dyes, chemicals, preservatives, or ingredients which render said meat or meat food products unsound, unhealthful, unwholesome, or unfit for human food."

Upon application to the District Court for a temporary injunction it was denied and complainant appealed and the District Court was reversed and a temporary writ of injunction ordered issued. *St. Louis Independent Packing Co. v. Houston*, 132 C. C. A. 65, 215 Fed. 553. We assume that upon receipt of the mandate a temporary injunction was issued by the District Court in accordance with our order although that fact does not appear in the record. No notice was ever had upon Dr. A. D. Melvin and he did not appear. Hon. David F. Houston, Secretary of Agriculture, and James J. Brougham, inspector in charges, filed separate answers in substantially the same form, the former on January 21, 1915. The case came on for



trial at the September term, 1915, as between the complainants and the defendants answering, and upon the evidence the District Court on March 20, 1916, dismissed the bill at complainant's cost, and it appeals. The opinion of the District Court upon the application for a temporary injunction will be found in 204 Fed. 120, and its opinion upon final hearing upon which its decree was reached from which this appeal was taken is found in 231 Fed. 779. The case having been three times reported we shall not make a full statement of the issues and evidence but content ourselves with stating such new matters as will be necessary to an understanding of the case, leaving the history of it to be learned from the former opinions.

The appellees earnestly urge a change in our rulings on the former appeal. This we cannot consider. The former opinion constituted the law of the case. The authorities upon this are so numerous that we cannot cite them individually. They will be found fully reviewed and cited in 2 Enc. of U. S. Sup. Ct. Repts. 412 to 415; *Ibid.*, vol. 12, page 142. In view, however, of the fact that the Secretary of Agriculture had not been served prior to the time of the former appeal, although his subordinate had been, we concede it is barely possible this rule does not apply to him. We therefore say that the argument in support of a change in our former rulings is not persuasive and the rulings are adhered to.

Notwithstanding its somewhat inaccurate statement in the bill, complainant has not been manufacturing sausage but a compound which is embraced in the term meat food products and known as sausage and cereal. Water is added and the power of the Agricultural Department to compel the use of the word "water" in the name of the compound has never been questioned. Thus it can require that plaintiff's product be labeled "sausage, cereal, and water" if it deems such conduct proper and it could even require that the label show the percentage of each article used. These meat food products have been marked for years by stamping upon every link of the sausage in large link goods the words "sausage and cereal." Where the links are very small this has been put upon every third to fifth link. The same inscription is put upon the ten pound cartons of shipment but as this does not reach the ultimate consumer it will for the present be ignored.

It affirmatively appears that the complainant's manufacture contains no dyes, chemicals, preservatives or ingredients that would render them unsound, unhealthy, unwholesome or unfit for human food. The sole question on this branch of the case is whether cereal in excess of two per cent or water in excess of three per cent may be added to sausage not to be sold as sausage, but to be sold as sausage and cereal or under such other name as the Secretary of Agriculture may prescribe, not, however, denying the right to use the word sausage. When the practice of mixing cereal with sausage commenced in this country the cereal was higher priced than the meat. One Government witness stated that the mixture of cereal with sausage made the compound less speedy of digestion.

Let us now see what was decided on the former appeal. It was here said:

"The entire meat inspection law (Act March 4, 1907, c. 2907, 34 Stat. 1260 [U. S. Comp. St. Supp. 1911, p. 1366]) was, as distinctly indicated in it, to prevent the sale of food which is unsound, unwholesome, or otherwise unfit for human use or misbranded. It was not the design of Congress in that law to provide standards of quality except to prohibit the sale of food which was unsound, unwholesome, or otherwise unfit for human use and secure true branding. The article in question, being sausage with cereal or sausage and cereal, was not intended to be prohibited by Congress. The act of Congress did contemplate, however, that the purchaser should know what he was buying. \* \* \* We come now to the provision inserted in section 16 of rule 18 that sausage shall not contain cereal in excess of 2 per cent. If this simply means that it shall not be sold as sausage, it possibly may have been valid, but the Government does not contend that this is its true meaning. If it meant that sausage sold as such should not contain cereal in excess of 2 per cent, but that sausage and cereal might contain more, it might be sustained. But the contention is that the Secretary of Agriculture had power to prohibit the manufacture and sale of sausage and cereal where the cereal was in excess of 2 per cent. This the Secretary of Agriculture had no power to do. \* \* \* The question is simply, Could he prohibit the making of a compound which was sound, healthful, wholesome, and free from dyes, chemicals, preservatives, or ingredients which render such unfit for human food by a mere regulation? We are constrained to say that he cannot. A compound of beef and pork would not entitle the Secretary of Agriculture to prohibit the words 'beef' and 'pork' to appear in the title and to condemn all such compounds on the label of which they appear."

It is claimed that the Secretary of Agriculture has issued, effective November 1, 1914, a new set of "Regulations Governing the Meat Inspection of the Department of Agriculture," and that previous regulations are abrogated thereby. This was, of course, long after the commencement of this suit. These new regulations omit the preamble to the order of February 28, 1913, referred to in 132 C. C. A. 35, 68, 215 Fed. 553, 556. The new regulations divide the substance of the circular in question and so far as material are as follows:

#### "Regulation 17. Labeling.

##### Section 9.

"Paragraph 2. When cereal is added to sausage within the limit prescribed by paragraph 4 of section 6 of regulation 18, there shall appear on the label in a prominent manner, contiguous to the name of the product, the statement 'cereal added.' When water in excess of 3 per cent and cereal are added to certain kinds of sausages as permitted by paragraph 5 of section 6 of regulation 18, the

same shall be labeled 'sausage, water, and cereal,' but when no cereal is added, the addition of water need not be stated.

"Paragraph 3. When cereal is added to any meat food product other than sausage in quantities not exceeding 5 per cent, the statement 'cereal added' shall appear on the label in a conspicuous manner continuous to the name of the product, and if any such product contains cereal in quantities exceeding 5 per cent, then 'cereal' shall appear as a part of the name of the product in uniform size and style of letters, for example, 'potted meat and cereal.' Provided, however, That products such as meat loaves, pates, soups, tripe with onion sauce, Irish stew, stewed kidneys, hash, chile con carne, tantales, boiled dinners, chop suey, scrapple, and the like, may contain cereal and similar substances without the presence of such substances being indicated on the labels."

"Regulation 18. Reinspection and preparation of meat and products.

"Section 6.

"Paragraph 4. Sausage shall not contain cereal in excess of 2 per cent.

"Paragraph 5. Water or ice shall not be added to sausage except for the purpose of facilitating grinding, chopping, and mixing, in which case the added water or ice shall not exceed 3 per cent, except that sausages of the class which are smoked or cooked, such as Frankfort style, Vienna style, and Bologna style, may contain added water in excess of 3 per cent, but not in excess of an amount necessary to make the product palatable."

It is manifest that this is but a rearrangement of the order of February 28, 1913.

The prayer of the bill is not to set aside any order of the Department of Agriculture but has been heretofore set forth in full. Surely a mere rearrangement of the regulation without changing their meaning would not deprive the complainant of the right to maintain this action. It is claimed, however, that the omission of the preamble to the order of February 28, 1913, has a material effect and

while the preamble showed the order was made to prevent mis-  
 175 branding its omission and the transfer of a portion of the order from "Labeling" to "Preparation of meat and products," makes it evident that the Secretary has found, as alleged in the 5th paragraph of his answer, that sausage and cereal with the cereal in excess of 2 per cent is unwholesome.

We will, for the purposes of this case, assume that the Agricultural Department has determined that sausage and cereal are not sound, healthful, and wholesome although it appears that paragraph 3 of section 9 of the 17th regulation is in conflict with this assumption. It appears from the Government's own testimony as well as from this regulation itself that under this provision the production of scrapple is permitted. Scrapple is defined by the Century Dictionary as—

"An article of food something like sausage meat, made from scraps of pork, with liver, kidneys, etc., minced with herbs, stewed with rye or corn meal, and pressed into large cakes. When cold it is cut in slices and fried. It is of Pennsylvania-Dutch origin."

Roughly speaking scrapple is simply sausage and cereal, the latter, however, largely preponderating. It is not put up in any tin container but as sold it is usually a loaf wrapped up. The Department permits Armour & Co. to make soseris in which there is sausage and unlimited cereal and water. Other institutions put up other compounds of sausage and cereal under their fanciful names. Meat loaf is so composed and manufactured with the approval of the Secretary. In the actual administration of the law there is no controversy with the department's officers so long as they do not use the name sausage in the title.

We held in this case on the former appeal that the department had no right to forbid the use of the word "sausage" on a compound in which it entered provided the article was not sold under a false or fictitious name and to that we adhere.

When this and the pure food law were pending in Congress it was well known that there were two distinct plans for pure food legislation. One was to prescribe formulas, the other was to pre-scribe that food was to be sound, healthful, and wholesome and that it should be truly branded. See *United States v. Lexington Mill Co.*, 232 U. S. 399.

176 This is well illustrated by the controversy which has raged for years about so-called alum baking powders. A number of learned chemists have cheerfully testified on both sides of that question. One side has sworn that the use of alum in baking powder in considerable quantities would make it highly injurious to health, the other has sworn that while this would be true if the alum was retained in the finished product the function of a baking powder was to generate a gas which in expanding would rend the product apart and make it light and the gas in so doing escaped and there was no alum in the finished product. Confronted by controversies like this, Congress passed the pure food law and the meat inspection law in the same session. In neither of them did it prescribe standards of quality, but it required true branding and the meat inspection law prohibited the sale of food which is unsound, unhealthful, unwholesome, or otherwise unfit for human use.

We are not prepared to say the regulation in question has any application to the manufacture and sale of sausage and cereal as distinguished from sausage, but the attempt to so construe it is an attempt to make the act of Congress do just what Congress had no thought of doing—pre-scribe formulas.

It is claimed that sausage and cereal will decay more rapidly than sausage. The evidence for the defendants shows that under certain conditions fresh sausage without any water or cereal will become mouldy in ten days and putrid in thirteen. Under the same condi-

tions with three per cent of water and no cereals it will become mouldy in six days and putrid in thirteen days. With three per cent of water and two per cent of cereal it will become mouldy in ten days and putrid in ten days. With no water and two per cent of cereal it will become mouldy and sour in ten days and putrid in thirteen days. With ten per cent of water and no cereal it will become mouldy and sour in ten days and putrid in thirteen days. With ten per cent of water and two per cent of cereal it will become mouldy in six days and sour and putrid in ten days. With no water and five per cent of cereal it will become mouldy and putrid in thirteen days. With three per cent of water and five per cent of cereal it will become mouldy in ten days and putrid in thirteen days, exactly the same time required for pure sausage to become mouldy and putrid. With ten per cent of water and five per cent of cereal it became mouldy and sour in ten days. With twenty per cent of water  
 177 and five per cent of cereal it became mouldy in six days and putrid in ten days, and the same was true with twenty per cent of water and ten per cent of cereal. It is claimed that the diminished life of the product is due to fermentation in the corn-flour and water. While the length of life of the product seems to slightly vary in inexplicable manner, we shall assume that sausage, cereal, and water will become mouldy in six days, which we shall also assume would stop its sale, while pure sausage would last ten days. Does this authorize the Secretary of Agriculture to stop its sale while sound?

Regulation 18, section 1, paragraph 1 is:

"All meat and products, whether fresh or cured, even though previously inspected and passed, shall be reinspected by bureau employees as often as may be necessary in order to ascertain whether the same are sound, healthful, wholesome, and fit for human food at the time the same leave official establishments. If, upon such reinspection, any article is found to have become unsound, unhealthful, unwholesome, or in any way unfit for human food, the original mark, stamp, or label thereon shall be removed or defaced and the article condemned."

This regulation is clearly within the power of the Secretary of Agriculture and enables him to see that no product is sold after it becomes mouldy, sour, rancid, or putrid.

It is a matter of common knowledge that there is the greatest variance in the keeping qualities of organic substances sold for human food. Some early summer apples are short lived while others will keep until the next crop is harvested. Could a public officer who had the power to pass upon whether apples were sound, healthful, wholesome, and fit for human food condemn summer apples when they were faultless because they would not keep as long as Ben Davis, for example? Can food be pronounced unsound, unhealthful, unwholesome or unfit for human food because, within some number of days after its manufacture and sale, it may possibly become so?

The compound here in question is ordinarily delivered to the retailer within twenty-four hours and to the consumer within forty-eight, and upon the assumption that we have made, would grow mouldy in six days, reaching the consumer four days before 178 it has so far deteriorated as to become mouldy. That is a matter concerning which the Secretary of Agriculture has nothing to do under the law. There is no claim that if the packers kept pure sausage for four days and then offered to sell it to the retailer the Department of Agriculture could prevent such sale, although confessedly it would have no longer life than the composition produced by the complainants has. While the answer in the fifth paragraph denies that the cereal used is wholesome, there is much evidence that it is wholesome and none that it is not. The department now claims that the chief ingredient of the cereal is starch and that to make this readily digestible it is required to subject it to more heat than the housewife ordinarily applies and the failure to do this reduces the speed of digestion. Again there is great variance in organic matter sold as food in the speed with which it is digested. Such variance does not constitute any of the food unsound, unhealthful, or unwholesome as these terms are used in the law.

We have already held that the Secretary of Agriculture may by his control over the labels prevent the sale of sausage and cereal under any false or deceptive name and in this sense his regulations are valid that sausage shall not contain over two per cent of cereal but he has absolutely no power to refuse to have "passed" sausage and cereal which contains more than two per cent of cereal and if he has attempted to go further he has attempted to rewrite the Act of Congress in his official capacity and if so such assumption of authority by him is not conclusive on all the world.

If he wants a law which will enable him to prepare formulas further than the present law does he may or may not succeed in modification of the existing law.

The defendants contend that the action of the Secretary of Agriculture in declaring meat products unsound, unhealthful or unwholesome is conclusive. We have already shown that the Secretary has never in fact held that sausage and cereal were unwholesome but if he had his finding would not be conclusive.

The first case cited by appellees is *Marbury v. Madison*, 1 Cranch 137. In that case the court said, page 166:

"The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather 179 to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who

considers himself injured, has a right to resort to the laws of his country for a remedy."

And on page 170:

"Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation. But where he is directed by law to do a certain act, affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, and therefore, is never presumed to have forbidden: as, for example, to record a commission or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived, on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department."

In that case it was held an original action in the Supreme Court for mandamus could not be maintained but that opinion shows it could have been maintained in a nisi prius court. Appellees next cite *Kendall v. United States*, 12 Peters 524. That was a suit for a writ of mandamus against the Postmaster General of the United States in the United States Circuit Court of the District of Columbia to compel him to credit the amount allowed by the Solicitor of the Treasury to certain contractors who were the relators in the suit. The court held that the Solicitor of the Treasury had by the act of Congress been created an arbitrator and that his findings were conclusive. This is now elementary. The other cases held that the writ of mandamus cannot run, and one that the writ of injunction cannot issue to control the decision of an executive officer, which we cheerfully concede to be the law.

180 In *Bates & Guild v. Payne*, 194 U. S. 106, which was started by a bill to compel the recognition by the Postmaster General of the right of the plaintiff corporation to have a periodical publication known as "Masters in Music" received and transmitted through the mails as a matter of the second class, and to enjoin defendant from enforcing an order theretofore made by him denying it entry as such, the court said, page 198:

"But there is another class of cases in which the rule is somewhat differently, and perhaps more broadly, stated, and that is, that where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong."

The case most nearly in point of any called to our attention is that of the *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94.



That was a case of a fraud order issued against the complainant by the Postmaster General. In the first place that was a case involving an alleged healing system, which is of course somewhat similar to determining the question of wholesomeness of food. The court said:

"That the conduct of the Post Office is a part of the administrative department of the Government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."

And again:

"Conceding, *arguendo*, that when a question of fact arises, which, if found in one way, would show a violation of the statutes in question in some particular, the decision of the Postmaster General that such violation had occurred, based upon some evidence to that effect, would be conclusive and final, and not the subject of review by any court, yet to that assumption must be added the statement that if the evidence before the Postmaster General, in any view of the facts,

failed to show a violation of any Federal law, the determination of that official that such violation existed would not be the  
181 determination of a question of fact, but a pure mistake of law on his part, because the facts being conceded, whether they amounted to a violation of the statutes, would be a legal question and not a question of fact. Being a question of law simply, and the case stated in the bill being outside of the statutes, the result is that the Postmaster General has ordered the retention of letters directed to complainants in a case not authorized by those statutes."

And again:

"The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual."

That whole case is worthy of careful consideration.

In *Howe v. Parker*, 111 C. C. A. 466, 190 Fed. 738, this court speaking by Sanborn, presiding judge, said at page 746:

"Whether or not the weight of evidence in substantial conflict sustains the one or the other side of an issue of fact is a question upon which, in cases within his jurisdiction, the final decision of the Secretary of the Interior is conclusive in the absence of fraud or gross



mistake. But whether or not there is at the close of a final trial or hearing before him any evidence to sustain a charge or a finding of fact in support of it is in his and in every judicial and quasi judicial tribunal a question of law. *Ward v. Joslin*, 186 U. S. 142, 147, 22 Sup. Ct. 807, 46 L. Ed. 1093; *United States Fidelity & G. Co. v. Board of Com'rs*, 145 Fed. 144, 151, 76 C. C. A. 114, 121; *Laing v. Rigney*, 160 U. S. 531, 540, 16 Sup. Ct. 366, 40 L. Ed. 525; *Southern Pacific Co. v. Pool*, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485; *The Francis Wright*, 105 U. S. 381, 387, 26 L. Ed. 1100; *Clement v. Insurance Co.*, 7 Blatchf. 51, 53, 54, 58, Fed. Cas. No. 2, 882; *Delaware, Lackawanna & Western R. Co. v. Converse*, 139 U. S. 469, 472,

11 Sup. Ct. 569, 35 L. Ed. 213. And an injurious error of 182 the secretary in finally deciding that question presents good ground for relief in equity. The Land Department of the United States is a quasi judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition and its decisions of the issues presented at such hearings are impervious to collateral attack. But its judgments and patents do not conclude the rights of claimants to the land. They rest on established principles of law and fixed rules of procedure, the application of which to each case conditions its right decision, and if the officers of the Land Department are induced to issue a patent to the wrong party by an erroneous view of the law or by a gross mistake of the facts proved, or by a decision induced by fraud, the rightful claimant is not remediless. He may in a court of equity avoid the effect of the decision and the patent and charge the legal title derived from it with a trust in his favor."

Citing numerous authorities.

It is claimed that while complainants sold their sausage and cereal at less than the price of sausage they did not make such a reduction as they might have made and this was a fraud upon the public and makes complainant's hands unclean and the rule that he who comes into a court of equity must come with clean hands precludes a recovery by them. That plaintiff sold the combination cheaper than pure sausage and at an agreed price even though it may have given them a somewhat larger profit than they could realize on pure sausage was not such a fraud as to preclude their maintaining this action.

The case is reversed and remanded with directions to the District Court to set aside its decree dismissing the complainant's bill and award plaintiffs a decree substantially as prayed, reserving the right of the defendants to apply for a modification of the injunction upon a showing that the Secretary has adopted new regulations as to labeling sausage and cereal requiring that the label show that cereal in excess of three per cent and water are used in the compound.

Filed May 7, 1917.

Amidon, district judge, dissenting.

This case has followed an unusual course, and has led to unfortunate results. When it was here on appeal from the order denying the preliminary injunction this court, without any  
 183 judicial investigation of the facts, decided that the name, "sausage" could be deprived of its false and deceptive character when applied to plaintiff's product, by the use of qualifying words, and ordered the temporary injunction to issue. The case then went back to be tried in the lower court upon the merits, but this court had already precluded such an investigation. Our decision was held to be binding upon the trial court that the name was not false and deceptive, and that court was shut up to an investigation of whether plaintiff's product was unwholesome. The result is that the question whether the name is false and deceptive, as used in the channels of trade, is finally decided by this court against the decision of the department solely on bill and answer, and without any investigation of the question. Fortunately, if this case shall be taken to a higher court for review, our decision on the appeal from the order denying a temporary injunction, will be open for re-examination. I shall, therefore, take occasion now to express my own views upon both branches of the case.

Speaking first to the question of unwholesomeness, the trial court has found as the result of the evidence adduced at the trial that plaintiff's product is unwholesome, and this is in accord with the findings of the department. I think those findings are binding upon this court, and should not be disturbed, and upon that ground the decree should be affirmed.

The case for the Government, however, is much stronger upon the ground that the use of the name "sausage," either singly or in connection with other words, when applied to plaintiff's product, is false and deceptive, and I shall now state my views on that subject.

"No meat or meat food products shall be sold or offered for sale by any person, firm or corporation in interstate or foreign commerce under any false or deceptive name. But established trade name or names which are usual to such products, and which are not false or deceptive, and which shall be approved by the Secretary of Agriculture are permitted."

This is the provision of the meat inspection law upon which this case turns. It does not help to a proper decision to emphasize the part of the law which deals with unwholesome meat as a reason  
 184 for minimizing the provision which I have quoted. By a later section of the statute the Secretary of Agriculture is given full power to make rules and regulations necessary to carry all provisions of the law into effect.

The difference of view between myself and the majority of the court may be stated in a few words. They believe that the Secretary of Agriculture, in preventing the use of false and deceptive names, is confined to inventing qualifying words which in their judgment will be sufficient to prevent the names being false and deceptive. That, it seems to me, is only a part of his power, and to confine him

thus to the dictionary is to take away other and more practical powers which the law confers. It is said by the majority that the law does not give the Secretary power to fix the standards for meat products. That, it seems to me, is sticking in mere forms of words. It may be that the Secretary's rules could have been expressed in better phraseology. His letter, however, by which the rules were promulgated, makes clear their purpose. There it is declared that they are enacted "for the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive name." In the light of this purpose the rules must be interpreted as if they read, "the name, 'sausage' shall not be used upon any package containing a meat food product if the product contains cereal in excess of two per cent or added ice or water in excess of three per cent, &c." Thus interpreted the rules come within the authority of the Secretary of Agriculture to make rules and regulations for the purpose of carrying into effect that provision of the statute which forbids the use of false and deceptive names upon meat food products.

One of the most effective ways of preventing names being false and deceptive is to fix the standard of articles to which those names may be applied. The law not only authorizes the Secretary of Agriculture to compel the use of qualifying words when that method will prove effective, but it likewise empowers him to say that a trade term like "sausage," which will be understood by the general public to include certain elements in the article, shall not be used if the article does not possess those elements. That is a practical way of preventing the use of the name for false and deceptive purposes. The record in this case shows that the Secretary of Agriculture has tried for years to deal with the subject by the use of qualifying words which indicate that other elements like cereal or potato have been added, and we ought to conclude from the fact that he has abandoned that method that he has found as the result of the actual experiences of commerce that it is ineffective, and that the word "sausage," even with such qualifiers, still continues to be false and deceptive to the public. As the result of that experience he has changed his method of attack. My brethren seem almost to assume that an equitable estoppel *in pais* ought to be applied to his adopting these new measures because of his unsuccessful experiences in using modifying terms. Such a view deprives that officer of the right to profit by experience.

Names and things are but the reverse sides of a single shield. One of the ways to prevent names being deceptive is to prescribe the qualities of articles to which they may be properly applied. That is one of the large features of the pure food and drug act. Those who deceive by the use of trade names understand this well. Their whole art consists in taking from an article having a familiar name some of the qualities which its name implies, and then continuing to apply the name to the changed article. Plaintiff admits that this is precisely what it is doing. It tells us that sausage was until quite recently made

from lean meat. The poorer qualities of sausage are now made from ears, snouts, livers, and other parts of the animal that were formerly waste. These cheaper parts, however, are deficient in fibre, necessary to give the sausage proper consistency. To meet this difficulty something else must be used as a binder. Cornmeal and water supply that need, so the plaintiff adopts them. That all sounds like progress in the industry and the saving of waste. We must not, however, allow it to deceive us. What has really been done is not only to substitute a poorer quality of food for a better, but to substitute cornmeal and water in place of meat. To apply the old name to this changed article is to make it false and deceptive. In the actual experiences of the meat trade, the addition of modifying words may be wholly ineffective to prevent the deception. My brethren say, however, that that is the only remedy which the law permits. In my judgment the statute clearly submits the whole subject to the Secretary, and the able corps of scientific men associated with him, to adopt whatever measure seems wise as the result of their studying the actual facts of the meat trade. It is an unwarranted use of judicial power for a court sitting in a law library to substitute its judgment for that which the law commits wholly to these administrative officers.

There is no just ground for holding that the regulations of the Secretary or his refusal to stamp plaintiff's products as inspected and passed are arbitrary. (a) The standard fixed by the regulations is in accord not only with the legislative action of the State of Pennsylvania but with the scientific investigations of the best students on the subject, particularly the investigation of the Association of German Food Chemists at their tenth general meeting held at Dresden in May, 1911, and numerous other associations of food experts referred to in the briefs for the Government. (b) The Government inspectors have not refused to mark plaintiff's products, if sound and wholesome, inspected and passed, if they are put up under some name of which the word "sausage" is not the distinctive feature, but base their refusal upon the ground that plaintiff insists upon the right to use the term "sausage" either singly or in composition, and that to permit it to do this would be to approve a false and deceptive name.

The majority opinion really comes to this: Appellant may make any combination of meat, cereals, and water which it sees fit, and affix the name "sausage" to the product, and the power of the Secretary of Agriculture is confined to inventing qualifying words or phrases to prevent this product from being false and deceptive. That I cannot regard as a sound interpretation of the statute. It clothes the department with power to prohibit the use of a name in connection with a product when the product is of such a character as to make the name false and deceptive. In the exercise of that power the Secretary may forbid the use of the name at all in connection with the compound if in the good faith exercise of his judgment he is of the opinion that the name when thus used is false and decep-

tive. It may well occur that no qualifying phrase which can be invented will take away the false and deceptive quality of the name in the channels of trade.

The dictionaries all tell us that sausage means a compound of meat, sage, and spices, and I agree with the trial court and the Supreme Court of Michigan (*Armour & Co. v. Bird*, 159 Mich., 1; 123 N. W., 380), that this is what it means to the general public.

187 Standard authorities say that ten per cent of cereal will absorb thirty per cent of water. So if appellant may exercise the right which it claims in its bill, the purchaser who thinks he is getting a meat product will be getting forty per cent of cornmeal and water. Considering the present high prices of meat, that is probably as clear a fraud as any transaction that has been condemned under the pure food and drug act.

I cannot accept the view that the mark "Inspected and passed" has nothing to do with the name, but means only that the meat product is wholesome and free from dyes and other forbidden ingredients. The section here involved has to do with food products placed or packed in cans or other receptacles. As to these the statute provides that the inspection is not complete until the package is labeled and sealed, or closed under the supervision of an inspector, and as a part of the same sentence it is provided that the meat products thus put up shall not be sold under a false or deceptive name. By the department rules the essential features of the label are, (1) the true name of the product; (2) the inspection legend; (3) the establishment number. From these provisions I think the words "inspected and passed," when placed upon the label of which the name is a part, fairly mean and will be understood by the purchaser of the package to mean not only that the food product is wholesome and fit for food but that the name is not false or deceptive when applied to the contents of the package. Under the statute it is as much the duty of the Secretary of Agriculture to protect the public against fraud by a deceptive name as against poison by an unwholesome article, and when a package with a name upon it is stamped "Inspected and passed," I can find no reason why the Secretary should not see to it that the article is true to the name as well as wholesome. Congress goes so far as to say that established trade names may not be used if they are deceptive, and requires even such names to be approved by the Secretary of Agriculture. This, in my judgment, commits to that officer the determination not only what name shall be used but what thing shall be entitled to use established trade names.

There is another independent ground for the affirmance of the decree. It is manifest upon the record that plaintiff's cereal-and-water sausage is a cheat upon the poor to whom it is mainly sold. Such ancient maxims as "He that doeth iniquity shall not have equity" forbid the granting to it of any relief. Our decision,

188 however, awards the extraordinary writ of mandatory injunction commanding officers to stamp what they have found to be a

fraud "Inspected and passed," thus compelling them to aid and abet the fraud which they were appointed to prevent.

In my judgment the decree dismissing the bill was clearly right and should be affirmed.

Filed May 7, 1917.

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*Decree.*

United States Circuit Court of Appeals. Eighth Circuit.

May Term, 1917. Monday, May 7, 1917.

ST. LOUIS INDEPENDENT PACKING COMPANY, A CORPORATION, appellant,

*vs.*

HONORABLE DAVID F. HOUSTON, SECRETARY OF AGRICULTURE, and James J. Brougham, chief inspector of the Bureau of Animal Industry of the Department of Agriculture.

No. 4692.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby, reversed without costs to either party in this court, and the cause is remanded with directions to the District Court to set aside its decree dismissing the complainant's bill and award plaintiff a decree substantially as prayed, reserving the right of the defendants to apply for a modification of the injunction upon a showing that the Secretary has adopted new regulations as to labeling sausage and cereal requiring that the label show that cereal in excess of three per cent and water are used in the compound.

May 7, 1917.

190 *Petition of appellees for appeal to Supreme Court, U. S.*

In the United States Circuit Court of Appeals. Eighth Circuit.

ST. LOUIS INDEPENDENT PACKING COMPANY, A CORPORATION, plaintiff, respondent,

*vs.*

HONORABLE DAVID F. HOUSTON, SECRETARY OF AGRICULTURE; A. D. Melvin, chief of the Bureau of Animal Industry of the Department of Agriculture; and James J. Brougham, chief inspector of the Bureau of Animal Industry of the Department of Agriculture, defendants, appellants.

No. 4692.

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# **CARD 3**



The above-named defendants, David F. Houston, A. D. Melvin, and James J. Brougham, conceiving themselves aggrieved by the final judgment and decree entered on May 7, 1917, in the above-entitled proceeding, reversing the order of the District Court, dismissing complainant's bill, and ordering that a decree be entered conforming to complainant's prayer, do hereby appeal from said judgment and decree to the Supreme Court of the United States, and pray that this their appeal may be allowed and that a transcript of the record, proceedings, and papers, upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

191

W. H. WOODWARD,

*Assistant United States Attorney, for defendants and appellants David F. Houston, A. D. Melvin, and James J. Brougham.*

Dated this July 30, 1917.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 2, 1917.

*Assignment of errors on appeal to Supreme Court, U. S.*

Now come David F. Houston, A. D. Melvin, and James J. Brougham, appellants, and make and file this their assignment of errors:

1. The Circuit Court of Appeals of the United States for the Eighth Circuit erred in refusing to affirm the judgment of the  
192 District Court of the United States for the Eastern District of Missouri in dismissing complainant's bill on the ground that said bill did not state a cause of action cognizable in equity.

2. The Circuit Court of Appeals of the United States for the Eighth Circuit erred in setting aside the decree of the District Court of the United States for the Eastern District of Missouri and in ordering said court to enter a decree in conformity with the prayer of complainant's bill.

3. The Circuit Court of Appeals of the United States for the Eighth Circuit erred in holding that questions presented on a prior appeal in this cause could not be reviewed upon a subsequent appeal.

4. The Circuit Court of Appeals of the United States for the Eighth Circuit erred in holding that the Secretary of Agriculture had no authority under the meat-inspection act, 34 Statutes at Large, 669, to promulgate and enforce B. A. I. Order 211.

5. The Circuit Court of Appeals of the United States for the Eighth Circuit erred in reviewing the finding upon a question of fact, by the Secretary of Agriculture.

6. The Circuit Court of Appeals of the United States for the Eighth Circuit erred in reversing the finding, upon a question of fact, by the trial court, where the evidence was conflicting.



7. The Circuit Court of Appeals of the United States for the Eighth Circuit erred in not affirming the decree of the court below dismissing complainant's bill on the ground that the complainant had been guilty of fraudulent practices concerning the subject matter in controversy.

193 The Circuit Court of Appeals of the United States for the Eighth Circuit erred in holding that the determination of what constituted false or deceptive names under the meat-inspection act was for the determination of the court.

W. H. WOODWARD,  
*Assistant United States Attorney, for Appellants.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 2, 1917.

*Order allowing appeal to Supreme Court, U. S.*

Now come defendants in the above-entitled cause, by their solicitor, and file and present to the court their assignment of errors and their petition for an appeal from the final judgment and decree ordering that a decree be entered in conformity with the prayer in complainant's bill, rendered herein on May 7, 1917, to the Supreme Court of the United States, on due consideration whereof it is:

Ordered: That said appeal be granted as prayed.

WALTER I. SMITH,  
*Circuit Judge, 8 Circuit.*

August 2, 1917.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 2, 1917.

UNITED STATES OF AMERICA ss:

*To St. Louis Independent Packing Company, or Franklin Ferriss, its Attorney of Record, Greeting:*

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal, filed in the clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein David F. Houston, A. D. Melvin, and James J. Brongham are appellants and you are respondent, to show cause, if any there be, why the judgment rendered against the said appellants, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Walter I. Smith, circuit judge of the United States Circuit Court of Appeals, Eighth Circuit, this 2nd day of August, in the year of our Lord one thousand nine hundred and seventeen.

WALTER I. SMITH,  
*Circuit Judge of the United States Circuit  
Court of Appeals, Eighth Circuit.*

Service of the foregoing citation is acknowledged Aug. 6, 1917.

FRANKLIN FERRIS,  
*Attorney for St. Louis Independent Packing Co.*

(Endorsed:) No. 4692. St. Louis Independent Packing Company, appellant, *vs.* Hon. David F. Houston, Secretary of Agriculture, et al. Citation on appeal to Supreme Court, U. S. Filed Aug. 7, 1917. E. E. Koch, clerk.

*Clerk's certificate.*

United States Circuit Court of Appeals. Eighth Circuit.

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein St. Louis Independent Packing Company, a corporation, was appellant, and Honorable David F. Houston, Secretary of Agriculture, et al., were appellees, No. 4692, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the twenty-third day of July, A. D. 1917, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the judges of the District Court of the United States for the Eastern District of Missouri.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this eleventh day of August, A. D. 1917.

[SEAL.]

E. E. KOCH,  
*Clerk of the United States Circuit Court of  
Appeals for the Eighth Circuit.*

(Indorsed on cover:) File No. 26134. U. S. Circuit Court Appeals, 8th Circuit. Term No. 667. David F. Houston, A. D. Melvin, and James J. Brougham, appellants, *vs.* St. Louis Independent Packing Company. Filed September 7th, 1917. File No. 26134.

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# THE HISTORY OF THE UNITED STATES

OF AMERICA

FROM THE FIRST DISCOVERY OF THE CONTINENT

TO THE PRESENT TIME

BY

JOHN F. JOHNSON

OF THE CITY OF NEW YORK

AND

OF THE STATE OF NEW YORK

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# In the Supreme Court of the United States.

OCTOBER TERM, 1918.

DAVID F. HOUSTON, A. D. MELVIN, AND JAMES J. BROUGHAM, APPEL- LANTS,  v. ST. LOUIS INDEPENDENT PACKING COMPANY.	}	No. 264.
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*ON APPEAL FROM THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE EIGHTH CIRCUIT.*

## BRIEF FOR APPELLANTS.

### STATEMENT OF CASE.

The bill in this cause was filed by the appellee corporation, a manufacturer of sausage for interstate commerce, against the Secretary of Agriculture and his subordinates of the Bureau of Animal Industry to compel them to mark its product "Inspected and passed" and to have declared void the regulations under which they were refusing so to do.

### QUESTION INVOLVED.

The regulations adopted by the Secretary of Agriculture under the meat-inspection acts, in effect, prohibit the use of the name "sausage" on any meat product which contains more than 2 per cent of

cereal and, except under certain conditions, 3 per cent of ice or water. Appellee's product contains a greater quantity of each, and the ultimate matter in dispute is the right it asserts to sell this product in interstate commerce under the name of "sausage," or "sausage and cereal," or "sausage, water, and cereal," notwithstanding the regulation.

#### HISTORY OF THE CASE.

The District Court declined to grant a temporary injunction, holding that the regulations in question were authorized to prevent the sale of appellee's product under a false or deceptive name. (204 Fed. Rep. 120.)

On appeal from this ruling the Circuit Court of Appeals, Judge Amidon dissenting, while recognizing that to call this product simply sausage would be to give it a deceptive name, held that the name "sausage and cereal" was not deceptive. Accordingly, the decree of the District Court was reversed and the case remanded with directions—

to issue an injunction restraining the chief inspector of the Bureau of Animal Industry in charge of plaintiff's plant from refusing to mark complainant's product as "Inspected and passed," upon the ground that it contains cereal in excess of 2 per cent or water in excess of 3 per cent, so long as it is marked "Cereal added," or "Sausage and Cereal," as now or hereafter required by regulation of the Secretary of Agriculture, and if the Secretary of Agriculture shall hereafter require that the

product shall be marked "Water added," or with the amount of water added, the preliminary decree shall be subject to be modified accordingly. (215 Fed. Rep. 553, 562.)

After the case had been remanded, process was served upon the Secretary of Agriculture and answers were filed denying all material allegations of the bill, including the one to the effect that the product in question was sound and wholesome. A considerable volume of evidence was submitted and the cause was heard on the merits. The district judge, treating the question as to the deceptive character of the name as settled against the Government, again sustained the regulations, holding, upon the evidence, that appellee's product was not a wholesome food and summing up his conclusions as follows:

1st. The regulations promulgated by the Secretary in 1914 were within his province and power to make, in determining the question as to whether the product of more than 2 per cent of cereal and 3 per cent of water rendered such product unwholesome and unfit for human food.

2d. The evidence in the case, without regard to the regulations, satisfies the court that upon the issues joined the finding must be for the defendants. (Rec., pp. 24, 30, 31; 231 Fed. Rep. 779, 783.)

On a second appeal the Circuit Court of Appeals was divided in opinion. A majority of the judges reversed the decree. After holding that appellee's product was



not unwholesome, and that the Secretary of Agriculture had not so decided, they said:

We have already held that the Secretary of Agriculture may by his control over the labels prevent the sale of sausage and cereal under any false or deceptive name, and in this sense his regulations are valid that sausage shall not contain over 2 per cent of cereal; but he has absolutely no power to refuse to have "passed" sausage and cereal which contains more than 2 per cent of cereal, and if he has attempted to go further he has attempted to rewrite the act of Congress in his official capacity, and, if so, such assumption of authority by him is not conclusive on all the world. (Rec., p. 175; 242 Fed. Rep. 337, 343.)

Judge Amidon, dissenting, held:

1st. That the trial court had, in accord with the findings of the Department of Agriculture, found the product to be unwholesome, and that this finding was binding and should not be disturbed.

2d. That the use of the name "sausage," either singly or in connection with other words, when applied to the product in question is false and deceptive. (Rec., pp. 179-183; 242 Fed. Rep. 346-349.)

#### THE STATUTE.

The act first provides for inspectors to examine, under "rules and regulations to be prescribed by the Secretary of Agriculture," all hogs, cattle, etc., about to be slaughtered for interstate or foreign com-

merce, "for the purpose of preventing the use in interstate or foreign commerce" of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food. For the same purpose there is required a similar inspection of the carcasses after slaughter and also of all meat and meat food products prepared for interstate or foreign commerce, as to the latter the act providing:

And said inspectors shall mark, stamp, tag, or label as "Inspected and passed" all such products found to be sound, healthful, and wholesome, and which contain no dyes, chemicals, preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome, or unfit for human food. (34 Stat., ch. 2907, p. 1261.)

Otherwise, the products are to be marked "Inspected and condemned." (Id. 1261.)

Thus far the act deals alone with the wholesomeness of the meat or products. But the next section introduced the other purpose of Congress—that is, the purpose to protect the consumer against deception and enable him to know what he is buying. It is as follows:

That when any meat or meat food product prepared for interstate or foreign commerce which has been inspected as hereinbefore provided and marked "Inspected and passed" shall be placed or packed in any can, pot, tin, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this Act is maintained, the person,

firm, or corporation preparing said product shall cause a label to be attached to said can, pot, tin, canvas, or other receptacle or covering, under the supervision of an inspector, which label shall state that the contents thereof have been "inspected and passed" under the provisions of this Act; and no inspection and examination of meat or meat food products deposited or inclosed in cans, tins, pots, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this Act is maintained shall be deemed to be complete until such meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector, and no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted. (Id. 1262.)

It is finally provided that the inspectors—

shall perform such other duties as are provided by this Act and by the rules and regulations to be prescribed by said Secretary of Agriculture; and said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this Act, and all inspections and examinations made under this Act shall be

such and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture not inconsistent with the provisions of this Act. (Id. 1264.)

#### THE REGULATIONS.

From the first, sausage has claimed the attention of the department, and the effort has been to devise rules and regulations which would accomplish the twofold purpose of the act by securing a wholesome product and enabling the consumer to know what he buys. The regulation now complained of is the final result of these efforts.

It was found that the custom had grown up of using in certain classes of the product sold as sausage varying quantities of cereal and water. The use of cereal and water furnishes ingredients which are much cheaper than meat and make the cost of production less. Moreover, the presence of these ingredients can not be detected by the consumer, and they serve to disguise the use of inferior meats—such as hearts, snouts, ears, etc.—which appellee admits can not be made to hold together so as to have the appearance and consistency of sausage without the liberal use of cereal and water as a binder. (Rec., pp. 39, 42, 57, and 66.) At the very beginning the department recognized that to sell such a product simply as sausage was a fraud and its regulations, as revised December 10, 1906, contained the following:

The word "Sausage" without a prefix indicating the species of animal is considered to be a mixture of minced or chopped meats,

with or without spices. If any species of animal is indicated, as "Pork sausage," the sausage must be wholly made from the meat of that species. If any flour or other cereal is used, the label must so state. (Rec., p. 51.)

The next question that engaged the attention of the department grew out of the fact that other substances may be mixed with meat so as to produce a product which, though not actually unwholesome, has less food value than the pure meat product. In the effort to prevent such products from being sold under deceptive names this was promulgated May 1, 1908:

A meat food product that contains a substance or substances, including water, added for the purpose of adulteration, and which lessens its food value, shall bear a label stating that such substance or substances have been added. (Rec., p. 52.)

Later, finding that the general requirement that the label must state the presence of cereal was not sufficient, the department made a ruling, July 15, 1909, requiring sausage containing cereal or benzoate of soda to be placed in suitable cartons bearing a statement showing their presence. On August 16, 1909, this was modified so as to dispense with cartons and stamp the statement on the casings of the sausage. (Rec., p. 52.)

In the further effort to carry to the consumer notice of the presence of ingredients other than meat it was ruled, February 15, 1911, that the words used should be "Cereal added" or "With cereal

added," and not merely the words "With cereal"; and, April 15, 1911, that when potato or bean flour was used the words should be "Potato flour added" or "Bean flour added." (Rec., pp. 52, 53.)

The department was evidently trying to devise some plan by which the public would not be deceived and yet the use of the word "sausage" not be wholly discarded, and, on April 15, 1912, it issued the following:

Labels for meat and meat food products to which cereal, potato flour, or similar substances are added will in the future be required to have the statements "Cereal added," "Potato flour added," etc., appear thereon in type of such size as will be in good proportion to the name of the product, provided the product does not contain more than 5 per cent of cereal, potato flour, etc. If this percentage is exceeded, the words "Cereal," "Potato flour," etc., must appear as a part of the name of the product in the same size and style type and on the same line; for example, "Sausage and cereal," "Sausage and potato flour." (Rec., p. 53.)

Finally, becoming convinced that the public could not be adequately protected against deception as long as the word "sausage" is used in connection with a product containing any considerable quantity of cereal, the department on February 28, 1913, issued the following:

For the purpose of preventing the use in interstate or foreign commerce of meat or meat

food products under any false or deceptive name, under the authority conferred on the Secretary of Agriculture by the provisions of the act of Congress approved June 30, 1906 (34 Stat., 674), Regulation 18 is hereby amended by the addition of sections 15 and 16, to read as hereinafter set out.

JAMES WILSON,

*Secretary of Agriculture.*

(Section 16, paragraph 1.) Sausage shall not contain cereal in excess of 2 per cent. When cereal is added its presence shall be stated on the label or on the product.

(Paragraph 2.) Water or ice shall not be added to sausage, except for the purpose of facilitating grinding, chopping, and mixing, in which case the added water or ice shall not exceed 3 per cent, except as provided in the following paragraph:

(Paragraph 3.) Sausages of the class which are smoked or cooked, such as Frankfurt style, Vienna style, and Bologna style, may contain added water in excess of 3 per cent, but not in excess of an amount sufficient to make the product palatable. When water (in excess of 3 per cent) and cereal are added to this class of sausages the statement "Sausage, water, and cereal," shall appear on the label or on the product, but when no cereal is added the addition of water need not be stated. (Rec., pp. 53-54.)

These are the regulations attacked in the bill. They were superseded by regulations effective November 1, 1914. The latter, however, contain exactly

the same provisions as those quoted above. (Rec., 122, 123.)

#### ASSIGNMENTS OF ERROR.

The assignments of error appear at pages 184 and 185 of the record. They call in question the action of the Circuit Court of Appeals in holding the regulations void and granting the injunction.

#### BRIEF.

##### I.

After a meat food product which is to be sold in any receptacle or covering has been inspected and passed as to wholesomeness, it is still subject to inspection until it has been put in the receptacle or covering and labeled in such manner, under the supervision of the inspector, that it will not be offered for sale under a deceptive name. (34 Stat. 1262.)

##### II.

To the Secretary of Agriculture has been committed the determination of the question of fact as to whether the word "sausage" as a part of the name of appellee's product is false and deceptive. He has decided that it is. If the question was now open to review, the evidence fully justifies his conclusion. (*Armour & Co. v. State Dairy, etc.*, 159 Mich. 1.)

##### III.

This decision of the Secretary of Agriculture is conclusive. (*Bates & Guild Co. v. Payne*, 194 U. S. 109; *Burfenning v. Chicago, St. Paul, Minneapolis &*



*Omaha Ry. Co.*, 163 U. S. 321, 323; *Johnson v. Drew*, 171 U. S. 93; *Gardner v. Bonestell*, 180 U. S. 362; *Decatur v. Paulding*, 14 Pet. 497; *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324; *Marquez v. Frisbie*, 101 U. S. 473; *Gaines v. Thompson*, 7 Wall. 347; *United States ex rel. Dunlap v. Black*, 128 U. S. 40; *Redfield v. Windom*, 137 U. S. 636.)

#### IV.

The use of the word "sausage" as a part of the name of appellee's product is a fraud which a court of equity will not aid. (*Manhattan Medicine Co. v. Wood*, 108 U. S. 218; *Worden v. California Fig Syrup Co.*, 187 U. S. 516.)

#### ARGUMENT.

The purpose of the legislation in question is two-fold—to protect the public (1) against the sale of unwholesome products and (2) against the sale of wholesome products under false and deceptive names. Unwholesome products are to be condemned and not sold for food in interstate or foreign commerce at all. Wholesome products are not to be sold under false or deceptive names. The Secretary of Agriculture is empowered to make the necessary regulations to accomplish both purposes.

The regulations in question were promulgated in a signed statement by the Secretary of Agriculture to the effect that they were "for the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive

name." It also appears that the department does not object to the use of products such as appellee's in interstate commerce provided the word "sausage" is not used in connection with them. Thus, a similar product is permitted to be sold under the name "Sosera" and a label bearing the words "meat, water, and cereal." (Rec., p. 137.)

In view of these facts the Government is disposed to concede that the adoption of these regulations did not involve a finding that the products in question are unwholesome. Nor will it now be insisted that the evidence produced on the trial establishes their unwholesomeness. It is preferred to rest the case upon the validity of the regulation as one to prevent deception.

The Secretary of Agriculture is required to have all meat and meat food products prepared for interstate or foreign commerce inspected. It may be conceded that, in the first instance, the object of this inspection is to determine their wholesomeness and that, if not unwholesome, they must be marked "Inspected and passed." But appellee's products, for the purpose of being sold, are placed in coverings or receptacles. And the section of the act quoted above provides that, under these conditions, the duty of inspection shall not end with merely ascertaining that the mixing of the ingredients produces a wholesome article of food. On the contrary, if any meat or meat food product is to be offered for sale "in any can, pot, tin, canvas, or other receptacle or covering," the manufacturer, after it has been found to be wholesome,

shall, under inspection, place it in the receptacle or covering and cause a label, stating that the contents have been inspected and passed, to be attached under the supervision of an inspector, and—

no inspection \* \* \* shall be deemed to be complete until such meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector, and no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted. (Sec. 5; Id. 1262.)

Thus, the inspector first examines the product to ascertain whether it is fit for food. It is then packed, subject to his inspection, to prevent its becoming unwholesome in the process of packing. And, finally, it is labeled under his supervision with the express injunction that it must bear a name which has the approval of the Secretary of Agriculture and will not deceive the public. To illustrate, the meat from the shoulder of a hog is as wholesome as that from the ham and would, in the first instance, be as readily passed by the inspector. So shoulder meat, deviled or potted, would be as wholesome as ham meat treated in a like manner, and would, of course, be passed. But when the packer proposes, under the

supervision of an inspector, to label it "potted ham," the inspector must obey the injunction of the law and protect the public against deception by refusing to let the label bear the words "Inspected and passed." He has passed the product as "potted shoulder" but not as "potted ham." Again, it may be that horse-flesh is not unwholesome, but some people have a prejudice against eating it. An inspector might, therefore, pass it as a wholesome food of its kind, but the public is entitled to be protected against eating it for something else. If it is used to make a meat loaf and labeled "horse loaf" it might be passed, but an inspector supervising the labeling certainly could not pass it as "beef loaf."

In order for a law to be effective as a means to prevent deception, the power must be conferred on some person or tribunal to determine what may be, without deception, sold under a given name. Congress has said that meat and meat food products shall not be sold under false or deceptive names. Plainly, a shoulder can not lawfully be sold as a ham. But there are food products which are sold either under a trade name, such as "Sosera," which indicates nothing as to the ingredients, or under a name which is usually applied to a certain class of articles, as "sausage." In either case, however, the trade or other name must not be false or deceptive and must be approved by the Secretary of Agriculture. In other words, the Secretary is the tribunal charged with the duty of determining whether a particular

name, when applied to a given product, is false or deceptive. To this end he must determine what is "beef loaf," "potted ham," "sausage," and similar articles of food.

This construction of the law was recognized by the Circuit Court of Appeals, for the majority opinion says:

We have already held that the Secretary of Agriculture may by his control over the labels prevent the sale of sausage and cereal under any false or deceptive name, and in this sense his regulations are valid that sausage shall not contain over two per cent of cereal, but he has absolutely no power to refuse to have "passed" sausage and cereal which contains more than two per cent of cereal  
\* \* \*. (Rec., p. 175; 242 Fed. Rep. 343.)

It was thus held that the Secretary could prevent the sale of appellee's product as *sausage*, but was powerless to interfere with its sale under the name of *sausage and cereal*. And, accordingly, the injunction granted restrained the officials from refusing to mark appellee's product "Inspected and passed"—

so long as it is marked "Cereal added" or "Sausage and Cereal," as now or hereafter required by regulation of the Secretary of Agriculture, and if the Secretary of Agriculture shall hereafter require that the product shall be marked "Water added," or with the amount of water added, the preliminary decree shall be subject to be modified accordingly. (Rec., p. 13; 215 Fed. Rep. 562.)

If, as conceded by the court, the Secretary had the jurisdiction to determine whether the name *sausage* was deceptive as applied to a given article, it is difficult to understand why he did not have the same jurisdiction to determine whether the name *sausage and cereal* was likewise deceptive when applied to the same article.

When the meat-inspection acts were passed it was found that products containing meat and varying quantities of cereal were being sold as sausage. It was evident that those who used sausage could only guess what they were eating. The department at once set out to remedy this condition by enforcing the law.

Sausage is well recognized as a meat product. It may be made, however, of different kinds of meat. In the first regulations, therefore, the term "sausage," without qualifying words, was permitted without regard to the kind of meat used. But if the product was called "pork sausage" or "beef sausage" it should contain no meat except that so indicated, and if both pork and beef were used it would be called "pork and beef sausage." The authority to make these regulations would scarcely be questioned. But no standard definition of sausage included cereal as one of its ingredients. As said by the Supreme Court of Michigan:

"Sausage" is defined by all the lexicographers as an article of food composed of meat, salt, and spices. See Worcester's and Cen-

tury Dictionaries. The people generally so understand it. The writer of this opinion would be compelled to admit that until very recently he had no knowledge that cereal was used in the manufacture of sausage. (*Armour & Co. v. State Dairy, etc.*, 159 Mich. 1.)

The Department of Agriculture, therefore, determined at once that to call an article "sausage," without more, would be misleading and deceptive if it contained any considerable quantity of cereal. It was thought, at first, however, that the public might be adequately protected by permitting the use of the word *sausage* if qualified by the words "cereal added" or by calling the article "sausage and cereal."

But subsequent investigation developed the fact that the use of cereal served three purposes: Being cheaper than meat, it reduced the cost of production; it decreased shrinkage in the process of smoking or drying and gave greater weight to the product when ready for market; and it enabled the packer to disguise and use inferior meats.

It was found that all-meat sausage, containing 100 pounds of meat, produced, when smoked, only 92 pounds of sausage. On the other hand, 70 pounds of meat, 10 pounds of cereal, and 20 pounds of water produced 93.7 pounds of "smoked sausage." (Rec., p. 75.) Thus, the packer from 70 pounds of meat and 10 pounds of cheap cereal could get more pounds of product than he could get from 100 pounds of meat; and, besides, he could use cheaper meat. It is claimed that cereal and water are used to furnish

moisture and binding qualities to the meat. (Rec., p. 39.) This is not necessary with such meats as the housewife in the country puts into her sausage. Appellee makes sausage for sale in Pennsylvania without using cereal in order to comply with the law of that State which forbids its use, and, during the period from May, 1913, to May, 1914, did not use cereal and water in sausage at all, and they are not used in what is known as "summer sausage." (Rec., pp. 36, 37, 41, 48, 56.) But appellee uses, in its product, inferior grades of meat, such as hearts, snouts, ears, etc. (Rec., p. 66.) These are dry and brittle and will not hold together—that is, when mixed, they will not make sausage. However, by mixing them with considerable quantities of cereal and water a product can be obtained which looks like sausage. By forbidding the use of the word *sausage* in connection with the name of such a product the Secretary of Agriculture has decided that to so use it will be false and deceptive.

If this determination of a question of fact was open to review, its correctness could scarcely be doubted. By appellee's process of mixing, sausage is not produced at all. Something is produced which looks like sausage, but at no stage of its manufacture is it sausage. Appellee does not first make sausage and then add cereal to it. Hence, to call the product "sausage and cereal" or "sausage with cereal added" would be misleading. When meats proper for sausage making are used it may be said that the product contains ingredients which taken alone and seasoned would



be sausage, but the process of manufacture has been diverted, and these ingredients have been mixed with cereal to obtain a product other than sausage. And when appellee takes hearts, snouts, ears, etc., and mixes them with cereal to make something resembling sausage it can not be said that the product even contains the ingredients of sausage, for these things will not hold together so as to make sausage. In any event, it can not be said that because some of the ingredients of an article of food are things out of which sausage might have been made, the word "sausage" may be used as a part of the name of the article.

But the question is not now open to review. Congress has enacted that food articles of this kind shall not be sold except under names approved by the Secretary of Agriculture, who has refused to approve any name for appellee's product which contains the word "sausage," upon the ground that it will be false and deceptive. This is conclusive of that question of fact. The determination of the question whether a particular name when applied to a particular article is false and misleading has, as we have seen, been committed by Congress to the Secretary of Agriculture, and this court has said:

The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with

it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing. *Bates & Guild Co. v. Payne*, 194 U. S. 109.

To the same effect:

*Burfenning v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 163 U. S. 321.

*Johnson v. Drew*, 171 U. S. 93.

*Gardner v. Bonestell*, 180 U. S. 362.

*Decatur v. Paulding*, 14 Pet. 497.

*Riverside Oil Co. v. Hitchcock*, 190 U. S. 316.

*Marquez v. Frisbie*, 101 U. S. 473.

*Gaines v. Thompson*, 7 Wall. 347.

*United States ex rel. Dunlap v. Black*, 128 U. S. 40.

*Redfield v. Windom*, 137 U. S. 636.

Moreover, the injunction prayed for would enable the appellee to sell a mixture of snouts, ears, etc., with cereal and water as *sausage and cereal* when a mixture of these inferior meats will not make sausage. This would be a fraud upon the public which a court of equity can scarcely be expected to aid. (*Manhattan Medicine Co. v. Wood*, 108 U. S. 218; *Worden v. California Fig Syrup Co.*, 187 U. S. 516.)

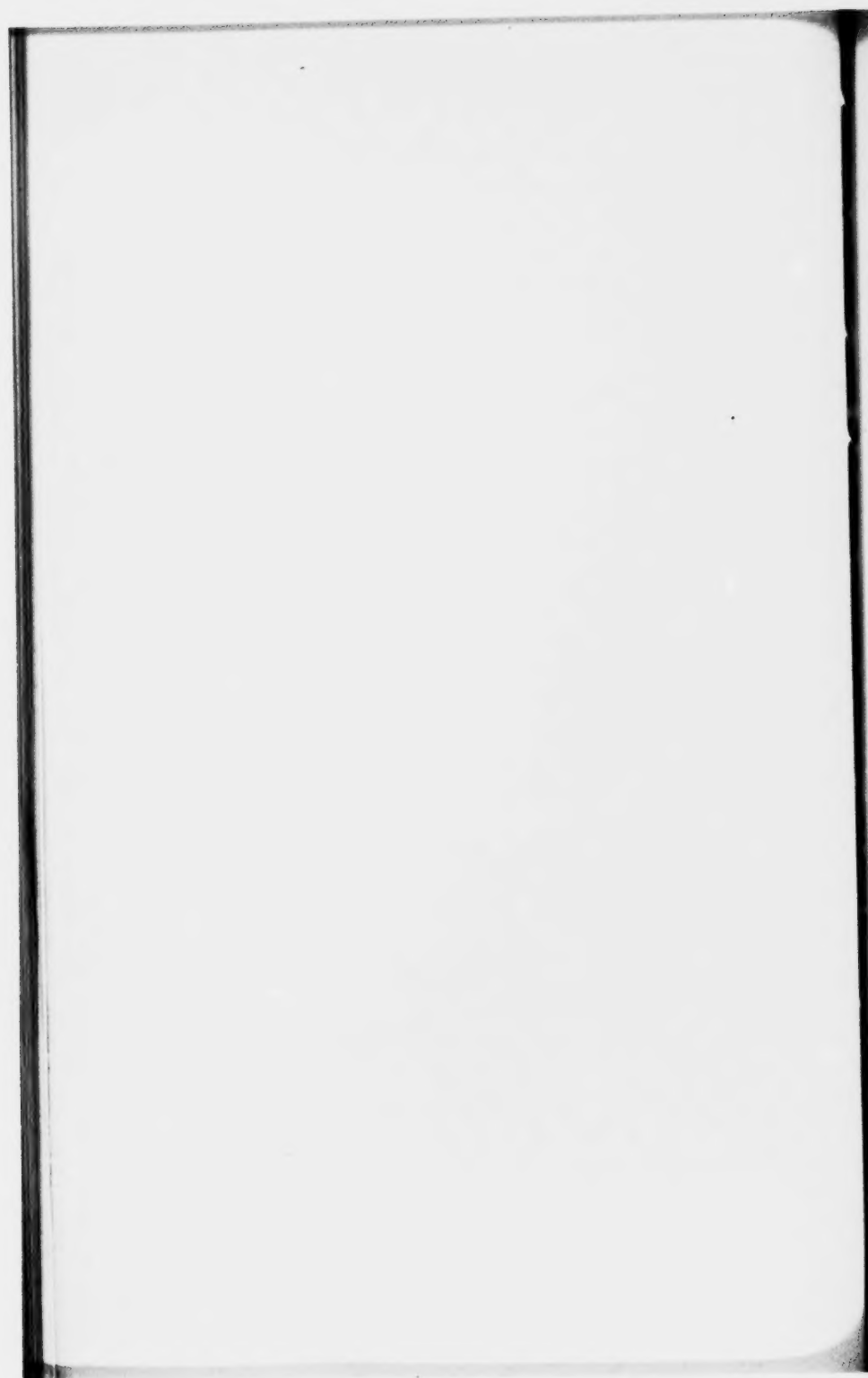
It is submitted that the decree should be reversed with directions to dismiss the bill.

WILLIAM L. FRIERSON,  
*Assistant Attorney General.*

CHARLES S. COFFEY,  
*Attorney.*

JANUARY, 1919.





Office Supreme Court, U. S.  
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No. 264.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1918.

DAVID F. HOUSTON, A. D. MELVIN and  
JAMES J. BROUGHAM,

*Appellants,*

*vs.*

ST. LOUIS INDEPENDENT PACKING  
COMPANY,

*Appellee.*

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT.

## Brief and Argument for Appellee.

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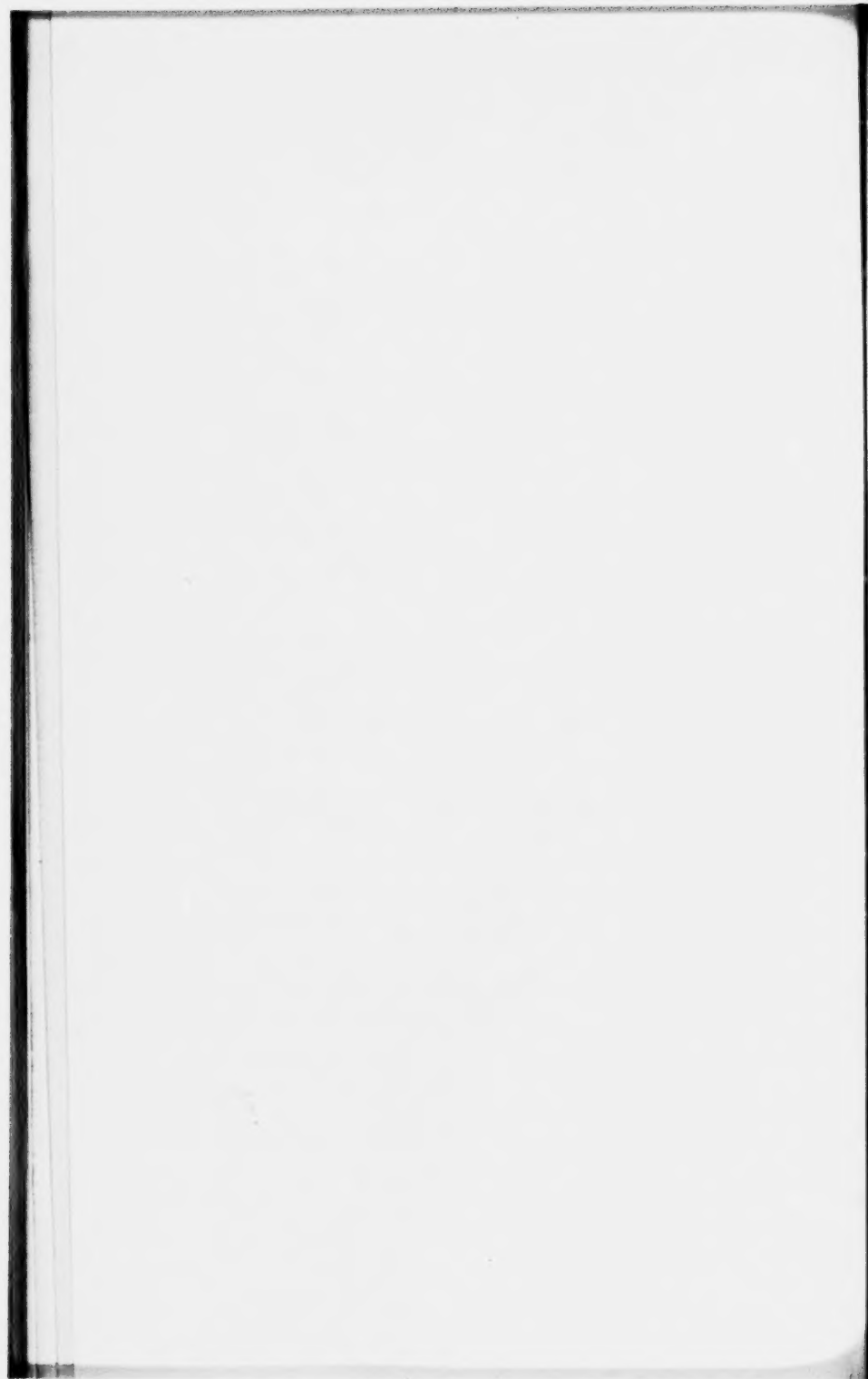
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## BRIEF AND ARGUMENT FOR APPELLEE.

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### STATEMENT OF CASE.

The bill of complaint charges, and the evidence shows, that appellee is and has for many years been a manufacturer of sausages, and has built up a large and lucrative interstate and intrastate trade therein. It has used in the manufacture of sausages, cereal made from wholesome ground grain in amounts varying from 2 to 10 per cent., and has used an appropriate amount of pure water to the extent necessary for properly mixing and manufacturing such sausage. All of appellee's



operations have been carried on under the inspection of government officials created by authority of the Act of Congress for meat inspection. The use of cereal and water in the manufacture of sausages is customary and general, and has been so for more than 50 years. Their use does not impair the food value or wholesomeness of the product. The sausage manufactured by appellee, using therein cereal and water as aforesaid, is a wholesome meat food product, entirely satisfactory to the trade, and fully meets the requirements of the Act of Congress known as the Meat Inspection Act, approved June 30, 1906.

The use of cereal in excess of 2 per cent. has been recognized and provided for by the Department of Agriculture from the beginning in various regulations promulgated by that department under the authority of the Meat Inspection Act. Such regulations attempted only to provide appropriate marks and labels to indicate such use.

In fact, as shown by the bill of complaint and the evidence, appellee has complied with all such former regulations promulgated by the department (Rec., 52, 53) and in force at the time of the promulgation of the regulations complained of and is willing to continue so to do.

Among these, for example, are the Service Announcements of April 15, 1912, and July 15, 1912.

The Service Announcement of April 15, 1912, is as follows:

“Labels for meat and meat food products to which cereal, potato flour or similar substances are added will in the future be required to have

the statement '*cereal added*,' 'potato flour added,' etc., appear thereon in type of such size as will be in good proportion to the name of the product, provided the product does not contain more than 5 per cent. of cereal, potato flour, etc. If this percentage is exceeded, the words '*cereal*,' 'potato flour,' etc., must appear as a part of the name of the product in the same size and style type and on the same line; for example, '*sausage and cereal*,' '*sausage and potato flour*.'"

The Service Announcement of July 15, 1912, is as follows:

"Referring to instructions in Service Announcements on April 15, 1912, page 26, under the heading 'Labeling of Meat and Meat Food Products Containing Added Substances,' attention is called to the fact that this applies to ink brands and burning brands as well as to labels, cartons, etc. Such brands should bear the statement '*Sausage and Cereal*,' if cereal is added in excess of 5 per cent., or '*Cereal added*,' if not in excess of 5 per cent."

On February 28, 1913, the Secretary of Agriculture promulgated the regulations in controversy in this case, as follows:

"For the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive name, under the authority conferred on the Secretary of Agriculture by the provisions of the Act of Congress approved June 30, 1906 (34 Stat. 674). Regulation 18 is hereby amended by the addition of Sections 15 and 16, to read as hereinafter set out.

JAMES WILSON,  
Secretary of Agriculture."

"Section 15. \* \* \*

Section 16, Paragraph 1. Sausage shall not contain cereal in excess of 2 per cent. When cereal is added its presence shall be stated on the label or on the product.

Paragraph 2. Water or ice shall not be added to sausage except for the purpose of facilitating grinding, chopping and mixing, in which case the added water or ice shall not exceed 3 per cent. except as provided in the following paragraph:

Paragraph 3. Sausages of the class which are smoked or cooked, such as Frankfort style, Vienna style and Bologna style, may contain added water in excess of 3 per cent., but not in excess of an amount sufficient to make the product palatable. When water (in excess of 3 per cent.) and cereal are added to this class of sausages the statement 'Sausage, water and cereal' shall appear on the label or on the product, but when no cereal is added, the addition of water need not be stated."

The record shows that upon the promulgation of these regulations, the inspectors, acting pursuant to the orders of the Secretary of Agriculture, refused to pass the sausages manufactured by appellee, which were sound, wholesome, healthful, and which contained no dyes, chemicals, preservatives or ingredients that rendered them unsound, unhealthful, unwholesome or unfit for human food, and *solely* upon the ground that they contained cereal in excess of 2 per cent. and water in excess of 3 per cent., notwithstanding they were labeled or appellee was prepared to label them, strictly in accordance with the service announcements just set forth, in force at the time of the adoption of the regulations complained of.

Paragraph 10 of the bill charges that the Bureau

of Animal Industry, acting through its chief, Dr. A. D. Melvin, with the approval of the Secretary of Agriculture, ordered the inspectors in charge of the inspection of appellee's meat food products *to refuse* to mark as "Inspected and Passed" all sausages manufactured by appellee, unless they contain not in excess of 2 per cent of cereal and 3 per cent. of water.

Paragraph 11 of the bill charges that "the local inspectors carrying on the work of inspection in the establishment" of appellee *have refused* to mark "as inspected and passed," appellee's food products "known as sausage of various styles," which are sound and wholesome, and fit for food, *for the sole reason* that said sausages contain cereal in excess of 2 per cent., and that water in excess of 3 per cent. was added to the other ingredients.

These allegations are specifically admitted in the answer. Paragraph 10 of the answer admits *the refusal* to mark appellee's sausages "inspected and passed" "unless such sausages shall be *manufactured* in compliance with the regulations set forth in the 9th paragraph of the bill," which regulations are those of February 28, 1913, in controversy in this case, and hereinbefore set forth, that is to say, with cereal not in excess of 2 per cent. and water not in excess of 3 per cent.

Paragraph 11 of the answer admits the refusal to mark appellee's meat food products, known as sausages, "inspected and passed," "*for the reason* that said products contained cereal in excess of 2 per cent. and water in excess of 3 per cent."

And throughout their answer appellants sought to

justify this on the ground that sausage with more than 2 per cent. of cereal is unwholesome, and on the trial their evidence was solely directed to sustain this charge.

It thus is expressly admitted by appellants that the refusal to mark was based solely on the manner in which appellee's products were made, or, in other words, *on the percentages of cereal and water they contained*, and not on the ground that being labeled "Sausage, cereal added," or "Sausage and cereal" in accordance with the service announcements of April 15, 1912, and July 15, 1912, in force at the time of the promulgation of the regulation complained of, February 28, 1913, such labels or names were false and deceptive.

The act of Congress upon which the regulation complained of is based, known as the Meat Inspection Act, was approved June 30, 1906, 34 L. 674. Some amendments were made thereto later which do not materially affect the questions involved. The purpose of this act is indicated upon its threshold.

Section 1 provides "that hereafter for the purpose of preventing the use in interstate or foreign commerce as hereinafter provided, of meat or meat food products which are unsound, unhealthful or unwholesome or otherwise unfit for human food, the Secretary of Agriculture, at his discretion, may cause to be made, by inspectors appointed for that purpose, an examination and inspection, etc."

Then follow provisions for inspecting animals *on the hoof*, and also *post mortem* inspection of carcasses, and the rejection of all which are found to be unsound or otherwise unfit for human food.

The act also provides (Section 4), "For the purposes hereinbefore set forth" (namely, to prevent the use in interstate or foreign commerce of unwholesome products), that all meat food products found to be sound, healthful and wholesome and which contain no dyes, chemicals, preservatives or ingredients which render them unsound, unhealthful, unwholesome or unfit for human food, shall be marked "Inspected and passed."

The effect of the above provisions is to make it mandatory upon the inspector to inspect and pass with approval wholesome meat food products.

The act further provides in Section 5 that no meat food products shall be sold or offered for sale "in interstate or foreign commerce" under "any false or deceptive name."

Then follow various provisions concerning inspection, penalty for violating the law in regard to labels and marks, and this: "Said Secretary of Agriculture shall from time to time make such rules and regulations as are necessary for the efficient execution of the provisions of this act and *all inspections and examinations made under this act shall be such and made in such manner as described in the rules and regulations* prescribed by the Secretary of Agriculture not inconsistent with the provisions of this act."

There is nothing in the act regulating the ingredients or the proportion thereof that may be properly used in the manufacture of food products. As the Court of Appeals, in the first appeal of this case, 215 Fed. 559, said:

"It was not the design of Congress in that law *to prescribe standards of quality.*"

And as said by the Court of Appeals on the second appeal (242 Fed. 341):

“We are not prepared to say the regulation in question has any application to the manufacture and sale of sausage and cereal, as distinguished from sausage; but the attempt to so construe it is an attempt to make the act of Congress do just what Congress had no thought of doing—*prescribe formulas.*”

The only limitation is that the same shall be wholesome and fit for human food. There is no reference whatever to the use of cereal or water in sausages. The plain purpose of the law is to secure in interstate commerce the transportation of wholesome food only, and the further purpose to secure upon packages containing meat food products such labels and marks as will prevent their being sold under any deceptive name. In other words, that the name upon the package shall indicate the character of the contents.

The Secretary of Agriculture is authorized to make all necessary regulations to make the law effective; that is, to secure the presence of wholesome ingredients in the food products and to provide for suitable marks and labels upon the packages to indicate the character of the contents and to see that they shall bear such name as will not be deceptive.

*Regulation 18*, to which Section 16, hereinbefore set forth, was added as an amendment, deals exclusively with the matter of labels, marks and tags which are to be placed upon the packages.

We complain of the following provisions in the above regulations of February 28, 1913: Section 16, paragraph 1: “Sausage shall not contain *cereal*

in excess of *two per cent.*" Paragraph 2: "Water or ice shall not be added to sausage except for the purpose of facilitating grinding, chopping or mixing, in which case the added *water* or *ice* shall not exceed *three per cent.*"

The remaining provision of the regulation regarding what shall be stated upon the label is not the subject of complaint in this bill.

There is no question now made on this appeal, by counsel for appellants, as to the wholesomeness of the food products manufactured by the appellee. It cannot be contended in the face of the evidence, and we assert that it is not a fact, that the presence of cereal and water in excess of 2 and 3 per cent., respectively, in any way renders the products unwholesome.

Our contention, therefore, is that the regulation in question, in so far as it attempts to limit the cereal and water to be used in the manufacture of sausage, is legislation pure and simple, and is beyond the authority of the Secretary of Agriculture, because the act permits the use of cereal and water in excess of 2 and 3 per cent., respectively, *provided the same is not unwholesome and does not render the commodity unfit for human food.*

We insist the Secretary has no power to condemn as unfit for the food, the sausage which contains cereal and water in excess of 2 and 3 per cent., respectively, *solely* upon the ground that it does contain such assumed excess, which, as the pleadings and the evidence in this case show, is what he attempted to do under the regulations complained of in this case.



We concede to the Secretary, for the purposes of this case, the right to make regulations which require such words "Cereal added" and "Cereal and water," etc., to be present on the label or name affixed to appellee's products in connection or in association with the word sausage.

But we contend, that the Secretary has no right to prohibit appellee from using the word sausage on the label or name affixed to its products in connection or association with the words "cereal added" or "cereal and water" or similar words, indicating the presence of cereal or water in the products.

Our contentions with reference to the character, scope and validity of the regulations are set forth in greater detail in our brief and argument following.

## BRIEF.

## I.

APPELLEE'S PRODUCTS BEING WHOLESOME, AND CONCEDED BY APPELLANTS TO BE WHOLESOME, THE REGULATION IN QUESTION AND THE REFUSAL OF APPELLANTS TO MARK APPELLEE'S PRODUCTS "INSPECTED AND PASSED" CANNOT BE JUSTIFIED OR BASED UPON SECTION 4 OF THE MEAT INSPECTION ACT.

(a) Appellee's products are not only conceded to be wholesome, but are conclusively shown to be such by the evidence.

(b) The adoption of the regulation in question did not involve a finding by the Agricultural Department that appellee's products are unwholesome, and this appellants concede.

(c) The evidence in this case shows conclusively that the Department of Agriculture recognizes and concedes the wholesomeness of sausage with cereal and water added.

(d) The wholesomeness of appellee's products is conceded by the preamble to the regulation in controversy, which states that the purpose of the regulation is to prevent the use of a deceptive name, and thus, by inference, admitting the product to be wholesome.

(e) The Department concedes the wholesomeness of the product and confirms the purpose expressed in the preamble of the regulations by failing to condemn the product as unwholesome.

## II.

APPELLEE'S PRODUCTS IN QUESTION BEING CONFESSEDLY WHOLESOME, AND THEREFORE ENTITLED TO BE MARKED "INSPECTED AND PASSED" UNDER SECTION 4 OF THE ACT, SO FAR AS THEIR WHOLESOMENESS IS CONCERNED, THE SOLE QUESTION IN THIS CASE IS, AS APPELLANT'S COUNSEL CONCEDE, DID APPELLANTS HAVE THE RIGHT TO REFUSE TO MARK APPELLEE'S PRODUCTS "INSPECTED AND PASSED" UNDER THE REGULATION IN CONTROVERSY AS ONE TO PREVENT DECEPTION. WE CONTEND IT DID NOT.

- (A) THE SALE OF APPELLEE'S PRODUCTS AS "SAUSAGE WITH CEREAL ADDED," OR "SAUSAGE, CEREAL AND WATER," OR "SAUSAGE WITH CEREAL AND WATER ADDED," ETC., IS NOT FALSE AND DECEPTIVE.

*St. Louis Independent Packing Co. v. Houston*, 215 Fed. 553, 559.

*Ibid.* 242 Fed. 337.

*Armour & Company v. Bird*, 159 Mich. 1.

- (B) NOR CAN THE SECRETARY OF AGRICULTURE MAKE OR HOLD BY REGULATION OR OTHERWISE THAT THE SALE OF APPELLEE'S PRODUCTS AS "SAUSAGE WITH CEREAL ADDED," OR "SAUSAGE, CEREAL AND WATER," OR "SAUSAGE WITH CEREAL AND WATER ADDED," ETC., IS FALSE OR DECEPTIVE, SINCE TO DO SO WOULD BE CONTRARY TO THE TRUTH AND FACT, AND WOULD CONSTITUTE A MERE ARBITRARY AND UNREASONABLE EXERCISE OF POWER, NOT AUTHORIZED BY THE MEAT INSPECTION ACT, AND NOT BINDING OR CONCLUSIVE UPON THE COURTS.

*St. Louis Independent Packing Co. v. Houston*, 242 Fed. 343, 345; and the cases therein cited.

*United States v. 11150 pounds of butter*, 115  
C. C. A. 463.

*Williamson v. United States*, 207 U. S. 425.

*United States v. Copper Co.*, 196 U. S. 207.

*Morrill v. Jones*, 106 U. S. 466.

*United States v. Grimaud*, 220 U. S. 506.

- (c) THE FORMER CONSTRUCTION OF SECTION 5 OF THE ACT BY THE DEPARTMENT SINCE 1906, HAVING RECOGNIZED THE RIGHT TO SELL SUCH PRODUCTS AS APPELLEE'S UNDER THE NAME "SAUSAGE" WITH QUALIFYING WORDS, PRESCRIBED IN THE FORMER REGULATIONS AND SERVICE ANNOUNCEMENTS, AND HAVING THEREBY DETERMINED THAT SUCH NAME WITH QUALIFYING WORDS IS NOT FALSE OR DECEPTIVE, SUCH CONSTRUCTION OUGHT NOW TO BE HELD CONCLUSIVE.

Lewis Sutherland Statutory Construction,  
Sec. 472, 474.

*United States v. Railway Co.*, 142 U. S. 615.

*Heath v. Wallace*, 138 U. S. 573.

*Hastings and Dakota R. Co. v. Whitney*, 132  
U. S. 357.

## III.

THE REGULATION IN QUESTION IN THIS CASE DID NOT REGULATE, NOR IN FACT, AS THE EVIDENCE AND THE PREVIOUS CONTENTIONS OF APPELLANTS DISCLOSE, WAS IT INTENDED TO REGULATE OR CONTROL THE NAME OR LABEL TO BE ATTACHED TO OR PUT UPON SAUSAGES CONTAINING MORE THAN 2 PER CENT. OF CEREAL AND 3 PER CENT. OF WATER, NOR DID IT ANNOUNCE THAT THE NAME OR LABEL "SAUSAGE WITH CEREAL ADDED" OR "SAUSAGE, CEREAL AND WATER" OR "SAUSAGE WITH CEREAL AND WATER ADDED" SHOULD NOT BE ATTACHED TO OR PUT UPON SUCH PRODUCTS, AND HENCE THE REFUSAL TO MARK APPELLEE'S PRODUCTS "INSPECTED AND PASSED" CANNOT BE JUSTIFIED BY THE REGULATION, OR OTHERWISE.

- (A) SECTION 16 OF THE REGULATIONS OF FEBRUARY 28, 1913, CANNOT BE CONSTRUED TO MEAN THAT CEREAL IN EXCESS OF 2 PER CENT. AND WATER IN EXCESS OF 3 PER CENT. MAY BE USED IN THE MANUFACTURE OF SAUSAGE, PROVIDED THE WORD "SAUSAGE" BE NOT USED IN THE NAME OR LABEL, OR THAT THE WORD "SAUSAGE" SHALL NOT BE USED IN THE NAME OR LABEL IF THE PRODUCT CONTAINS CEREAL IN EXCESS OF 2 PER CENT. OR WATER IN EXCESS OF 3 PER CENT.

THE REGULATION WAS INTENDED BY THE SECRETARY OF AGRICULTURE TO PROHIBIT ABSOLUTELY THE MANUFACTURE OF SAUSAGE WITH CEREAL IN EXCESS OF 2 PER CENT. AND WATER IN EXCESS OF 3 PER CENT., AND HENCE THERE WAS NO OCCASION TO PROVIDE AND THE REGULATION WAS NOT INTENDED TO PROVIDE FOR ANY

NAME OR LABEL THAT MIGHT BE APPLIED TO SAUSAGE WITH CEREAL AND WATER IN EXCESS OF THESE PERCENTAGES, AND WAS SO CONSTRUED BY THE DEPARTMENT.

*St. Louis Independent Packing Co. v. Houston*, 215 Fed. 553; *ibid.*, 242 Fed. 343.

(B) IN ANY EVENT, THE MOST THAT CAN BE SAID FOR SECTION 16 UNDER ANY PROCESS OF REASONING, IT SEEMS TO US, IS THAT IT FINDS THE NAME "SAUSAGE," WHEN APPLIED ALONE WITHOUT THE QUALIFYING WORDS "CEREAL OR WATER" TO PRODUCTS SUCH AS APPELLEE'S, TO BE FALSE AND DECEPTIVE. IT CANNOT BE SAID TO DETERMINE THAT THE NAME OR LABEL "SAUSAGE WITH CEREAL ADDED," OR "SAUSAGE, CEREAL AND WATER," OR "SAUSAGE WITH CEREAL AND WATER ADDED," IN ACCORDANCE WITH THE THEN EXISTING REGULATIONS AND SERVICE ANNOUNCEMENTS, IS FALSE OF DECEPTIVE.

#### IV.

THE SECRETARY OF AGRICULTURE HAS NOT, AS IS CONTENDED, DETERMINED BY THE ADOPTION OF THE REGULATION IN QUESTION THAT THE SALE OF APPELLEE'S PRODUCTS AS "SAUSAGE WITH CEREAL ADDED" OR "SAUSAGE, CEREAL AND WATER" OR "SAUSAGE WITH CEREAL AND WATER ADDED" IS FALSE OR DECEPTIVE AND IF HE HAD, THIS DETERMINATION WOULD NOT BE CONCLUSIVE UPON THE COURTS, FOR THE REASONS POINTED OUT IN DIVISION II OF OUR BRIEF AND ARGUMENT.

## V.

THE EFFECT OF THE REGULATIONS IN QUESTION AS SOUGHT TO BE ENFORCED IS TO PROHIBIT ALTOGETHER THE MANUFACTURE AND SALE OF SAUSAGES CONTAINING CEREAL IN EXCESS OF 2 PER CENT. AND WATER IN EXCESS OF 3 PER CENT., AND THIS IS BEYOND THE POWER OF THE SECRETARY OF AGRICULTURE.

*United States v. 11150 pounds of butter*, 115 C. C. A. 463.

*Williamson v. United States*, 207 U. S. 425.

*United States v. Copper Co.*, 196 U. S. 207.

*Morrill v. Jones*, 106 U. S. 466.

*United States v. Grimaud*, 220 U. S. 506.

## ARGUMENT.

## I.

APPELLEE'S PRODUCTS BEING WHOLESOME, AND CONCEDED BY APPELLANTS TO BE WHOLESOME, THE REGULATION IN QUESTION AND THE REFUSAL OF APPELLANTS TO MARK APPELLEE'S PRODUCTS "INSPECTED AND PASSED" CANNOT BE JUSTIFIED BY OR BASED UPON SECTION 4 OF THE MEAT INSPECTION ACT.

Counsel for appellants have narrowed the issue on this appeal to the "validity of the regulations as one to prevent deception," by conceding that Appellee's products are wholesome, and that the regulations in question are not based upon the unwholesomeness of such products.

Counsel say, that (pages 12 and 13, their Brief):

*"The Government is disposed to concede that the adoption of these regulations did not involve a finding that the products in question are unwholesome. Nor will it now be insisted that the evidence produced on the trial establishes their unwholesomeness. It is preferred to rest the case upon the validity of the regulation as one to prevent deception."*

In its answer and on the hearing of the merits in the courts below and in the Court of Appeals, however, appellants sought to justify the regulations under Section 4 of the act on the ground of the alleged unwholesomeness of appellee's products within the meaning of the Act.

Now appellants shift their position and urge, that



the regulation is "one to prevent deception," and concede that their former contention as to *unwholesomeness* is untenable.

In doing this, however, counsel for appellants indulge in a number of very misleading and unfair statements and contentions, which we deem it well in this connection, and at the outset, to point out and answer.

It is said (Brief, 7) that "it was found that the custom had grown up of using in certain classes of the product sold as sausage, varying quantities of cereal and water," thus giving the impression that this alleged custom was a matter of recent growth.

On the contrary, however, the bill alleges, and the evidence establishes the fact that this had been the practice, in any event, for fifty years or more, and had been recognized and acquiesced in by the Department of Agriculture from the beginning of the Act.

Again it is stated (page 7) that the use of cereal and water serves "to disguise the use of inferior meats, such as hearts, snouts, ears," etc.; and again (page 20) "when appellee takes hearts, snouts, ears, etc., and mixes them with cereal to make something resembling sausage, it cannot be said that the product even contains the ingredients of sausage"; and still again, that "by mixing them (the meats referred to) with considerable quantities of cereal and water, a product can be obtained which looks like sausage."

Then it is said (page 19):

"By forbidding the use of the word 'sausage' in connection with the name of such a product

the Secretary of Agriculture has decided that to use it will be false and deceptive."

Counsel also say that the meats in question are not "such meats as the housewife in the country puts into her sausage," and intimates that such meats are not "proper" for sausage.

Counsel conclude by intimating that the use of such meats was sought to be prevented by the Secretary of Agriculture on the ground that "to sell a mixture of snouts, ears, etc., with cereal and water, as sausage and cereal, when a mixture of these inferior meats will not make sausage," would be false and deceptive and a fraud upon the public.

Again, counsel in attempting to sketch the history of these regulations, indulge in gratuitous assumptions, without any evidence on which to base them.

Thus, it is said (Brief, 18):

"It was thought at first, however, that the public might be adequately protected by permitting the use of the word 'sausage,' if qualified by the words 'cereal added,' or by calling the article 'sausage and cereal.'"

Then counsel, without a particle of evidence to justify the insinuation, proceed:

"But subsequent investigation developed the fact (among others stated) that 'it enabled the packer to disguise and use inferior meats.'"

These are insidious, unfair and unjustifiable suggestions, designed to create prejudice against appellee, and to lead the court away from the true facts of the case. They are wholly gratuitous, and without a shadow of evidence upon which to base them.

The evidence shows that sausages of different

grades have always been made, and, so far as the evidence discloses, these meats, so contemptuously referred to, have been generally used from time immemorial. (Abst., 92, 125.) In the making of sausage only a comparatively small part of these meats are used. They are used with and the greater part of the sausage is made up of meat trimmings, either pork or beef. (Abst., 46, 90, 135.) They have always been recognized as wholesome and proper ingredients in the manufacture of sausage, and have been used under the supervision and with the approval of the Department of Agriculture. (Abst., 71, 125, 135.) The refusal to pass appellee's products was not based upon this ground whatever, but solely on the ground that they contained the prohibited percentages of cereal and water.

Of course, sausages could be made of the choicest meats, such as porterhouse and beef and pork loins. The cost, however, would prohibit sausage to the masses. Sausage, then, would be only an article for the rich. Even the Agricultural Department takes cognizance of this practical situation, and has encouraged manufacturers in the making of sausage within the reach of all classes. The Government has always encouraged the use of all parts of the animal carcass that are edible, and nutritive, and the edible and nutritive character of the parts referred to have never been challenged, and are beyond question. In fact it is a well known fact that the nutritive and food value of these parts is fully equal to that of the choicest cuts, such as pork or beef loins, etc.

The policy of utilizing all parts of the animal carcass has been a policy of conservation of food, to be

encouraged and not to be discouraged, so long as the result is a wholesome food product. Such parts of the animal as hearts, ears, tripe, pig's feet, snouts and calves' heads have always been regarded as wholesome food, and have been and are on sale generally in meat and grocery establishments throughout the country, as well as abroad. Some of them are, indeed, recognized as delicacies and are packed and sold in glass jars and other expensive packages.

*Counsel for appellants could not well do otherwise than concede appellee's products to be wholesome, and that the Secretary of Agriculture has not found to the contrary, in view of the clear and conclusive evidence in the case, and of the past and existing regulations of the Secretary of Agriculture and the practices of his department.*

The uncontradicted evidence shows that the sausage manufactured by appellee, which the inspector refused to pass, is composed of wholesome meat, salt, spices, cornmeal and water, and is a wholesome food within the terms of the Meat Inspection Act.

The rigid and minute supervision and inspections of the Department of Agriculture under its rules and regulations inevitably ensure such wholesomeness. The inspections begin with the animal on the hoof and continue on with never failing vigilance to the finished product in its can or container. All the ingredients, not only the meats, but the salt, sugar, spices, water, cereal and whatever else may be employed, are examined, tested and analyzed for their purity and wholesomeness before they are admitted to use.

The Court of Appeals found (242 Fed. Rep. 339) that the products of appellee were entirely wholesome, saying, among other things:

“It affirmatively appears that the complainant’s manufacture contains no dyes, chemicals, preservatives or ingredients that would render them unsound, unhealthy, unwholesome, or unfit for human food.”

The case of *Armour v. Bird*, 159 Mich. 1, 25 L. R. A. (N. S.) 616, referred to with approval by the Court of Appeals and cited by counsel for appellants also squarely so holds. This case arose under the pure food law of Michigan. It was claimed in that case by complainant that the use of cereal was so universal and well known that it was entitled to use the word “sausage” alone, as descriptive of a meat product, which had from one to ten per cent. of cereal and a proportionate amount of water added. The state claimed that cereal lowered the food value and that its use was deceptive. In that case there was a vast amount of testimony taken and a most exhaustive examination made. Forty-three witnesses were examined on behalf of the state and a much larger number on behalf of complainant. Throughout the entire testimony there was not the slightest suggestion that the use of cereal impaired the keeping qualities of sausage, or affected its wholesomeness. Both the trial court and the Supreme Court held that sausage so manufactured was a wholesome article of food, that cereal had been used for more than forty years and *that the sale of the product when labeled “Sausage with Cereal” was not deceptive.*

The Supreme Court of Michigan says:

"The following facts are admitted or established beyond controversy: (a) The sausage manufactured by the complainant is a wholesome article of food. It contains nothing deleterious to health. (b) It is a mixture or compound within the meaning of the proviso in the statute above quoted, being composed of meat, cereal, salt and spices. (c) It is made in accordance with the Act of Congress and directions prescribed thereunder by the Commissioner of Agriculture and under the inspections of the United States Inspectors. (d) Sausage is made of different kinds of meat, viz., pork, beef and veal. Whether manufactured for interstate commerce or domestic use within the State, it is sometimes made with cereal and sometimes without it. Cereal is not a necessary ingredient of its manufacture, although it has been used by most manufacturers for many years. (e) Water is an essential ingredient in the manufacture of sausage, whether made with or without cereal."

*"As manufactured by complainant it contains from two to ten per cent. of cereal. It is and has been for more than forty years recognized in the trade as sausage. When sold as sausage with cereal added, it deceives no one, is not an imitation, and manufacturers are entitled to manufacture and label it as sausage with cereal."*

*It is equally clear, as counsel now concede, that the adoption of the regulation in question did not involve a finding by the Agricultural Department that appellee's products are unwholesome.*

The Court of Appeals found (242 Fed. Rep. 343) that the Secretary of Agriculture never held or found that sausage with cereal is unwholesome, and conclusively demonstrated this to be true from the evidence, saying, among other things:

"We have already shown that the Secretary has never in fact held that sausage and cereal were unwholesome; but if he had, his finding would not be conclusive."

- (a) IN FACT THE EVIDENCE IN THIS CASE DEMONSTRATES CONCLUSIVELY THAT THE DEPARTMENT OF AGRICULTURE CONCEDES THE WHOLESOMENESS OF SAUSAGE WITH CEREAL AND WATER ADDED.

The Meat Inspection Act was passed in 1906. From that time until the trial of this case below, the department gave no intimation that the use of cereal in sausage was regarded as unwholesome. On the contrary its use in sausage, without limit as to percentage, was recognized until 1913. This appears clearly from the various regulations and service announcements found on pages 51-53 of the record. And even now the present regulation permits unlimited cereal in meat food products other than sausage by the following regulation (Rec., 54, Exhibit L):

"When cereal is added to any meat food product *other than sausage* in quantities not exceeding 5 per cent., the statement 'cereal added' shall appear on the label in a conspicuous manner contiguous to the name of the product, and if any such product contains cereal in quantities exceeding 5 per cent., then 'cereal' shall appear as a part of the name of the product in uniform size and style of letters, for example, 'potted meat and cereal.'"

- (b) THE WHOLESOMENESS OF CEREAL IS CONCEDED BY THE REGULATION IN CONTROVERSY.

The regulation of 1913 in controversy as promulgated, as set out in the bill (Rec., 6), and as ad-

mitted in the answer (Rec., 17) has prefixed a preamble which distinctly states that the purpose of the regulation is to prevent the use of a deceptive name, by inference admitting the product to be otherwise unobjectionable.

(c) THE DEPARTMENT CONCEDES THE WHOLESOMENESS OF THE PRODUCT, AND CONFIRMS THE PURPOSE EXPRESSED IN THE PREAMBLE TO THE REGULATION, BY FAILING TO CONDEMN THE PRODUCT AS UNWHOLESOME.

The sole power of the Secretary of Agriculture under Section 4 is confined to determining by inspection the wholesomeness, etc., of meat food products, and marking them either "Inspected and Passed" or "Inspected and Condemned," and, in the latter case, requiring their destruction for food purposes.

There is no alternative. The inspector must either pass or condemn, and if he condemns he must destroy for food purposes.

The bill of complaint charges (Rec., 7) that the inspectors have refused to pass the products in controversy, and are threatening to condemn such products for the sole reason that they contain cereal and water in excess of 2 and 3 per cent., respectively. The answer admits (Rec., 18) the refusal to pass the products for the reason that it contains cereal and water in excess of 2 and 3 per cent. *but denies* (Rec., 19) that the inspectors "threatened to mark as 'Inspected and Condemned' any of the meat food products known as sausage," *thereby conceding it to be wholesome and not subject to destruction.*

It is clear from the foregoing facts that the de-



partment has, from the beginning, recognized, and that it still recognizes, sausage with cereal and water added in excess of 2 and 3 per cent., respectively, to be wholesome.

*It being shown and conceded that appellee's products are wholesome, it is clear that the regulation in question cannot be based upon Section 4 of the Act.*

As the Court of Appeals in the first appeal of this case (215 Fed. 559) said:

"The entire Meat Inspection Law (Act March 4, 1907, c. 2907, 34 Stat. 1260—U. S. Comp. St. Supp. 1911, p. 1366) was, as distinctly indicated in it, to prevent the sale of food which is unsound, unwholesome, or otherwise unfit for human use or misbranded. It was not the design of Congress in that law to *provide standards of quality*, except to prohibit the sale of food which was unsound, unwholesome, or otherwise unfit for human use, and secure true branding. The article in question, being sausage with cereal, or sausage and cereal, *was not intended to be prohibited by Congress*. The Act of Congress did contemplate, however, that the purchaser should know what he was buying."

And, continuing, the court said:

"We come now to the provision inserted in Section 16 of Rule 18 that sausage shall not contain cereal in excess of 2 per cent. If this simply means that it shall not be sold as sausage, it possibly may have been valid; *but the government does not contend that this is its true meaning*. If it means that sausage sold as such should not contain cereal in excess of 2 per cent., but that *sausage and cereal* might contain more, it might be sustained. *But the contention is that the Secretary of Agriculture had power to prohibit the manufacture and sale of sausage and cereal, where the cereal was in ex-*

cess of 2 per cent. *This the Secretary of Agriculture had no power to do.*"

And, again continuing, the court said:

"The question is simply, Could he prohibit the making of a compound which was sound, healthful, wholesome, and free from dyes, chemicals, preservatives or ingredients which render such unfit for human food by a mere regulation? We are constrained to say that he cannot."

It thus appears that products such as appellee's are wholesome and that the regulation in question and appellants' refusal to mark appellee's products "Inspected and Passed," cannot be justified under Section 4 of the Act.

The only question that then remains is, can this be justified under the only other section of the Act, that has any application, namely, Section 5?

## II.

APPELLEE'S PRODUCTS IN QUESTION, BEING CONFESSEDLY WHOLESOME, AND, THEREFORE, ENTITLED TO BE MARKED "INSPECTED AND PASSED" UNDER SECTION 4 OF THE ACT, SO FAR AS THEIR WHOLESOMENESS IS CONCERNED, THE SOLE QUESTION IN THIS CASE IS, AS APPELLANTS' COUNSEL NOW CONCEDE, DID APPELLANTS HAVE THE RIGHT TO REFUSE TO MARK APPELLEE'S PRODUCTS "INSPECTED AND PASSED" UNDER THE REGULATION IN CONTROVERSY AS ONE TO PREVENT DECEPTION. WE CONTEND IT DID NOT.

The Court of Appeals stated (242 Fed. Rep. 339) the proposition as follows:

"The sole question on this branch of the case

is whether cereal in excess of 2 per cent. or water in excess of 3 per cent. may be added to sausage, not to be sold as *sausage*, but to be sold as *sausage and cereal*, or under such other name as the Secretary of Agriculture may prescribe, *not*, however, *denying* the right to use the word 'sausage.' "

Previous to the adoption of the regulation of February 28, 1913, herein complained of, the Bureau of Animal Industry permitted the employment of cereal and water in excess of 2 per cent. and 3 per cent. respectively, but regulated the label or name under which sausage so made was sold, by its service announcements hereinbefore set out and appearing in the record on pages 52 and 53. With these regulations appellee has always been content, and was, at the time of the adoption of the regulations of February 28, 1913, ready and willing, and has ever since been ready and willing, to comply.

The Bureau of Animal Industry, however, was not content with this, and by its regulation of February 28, 1913, prevented appellee from shipping and selling in interstate commerce any article commonly known as sausage, containing more than 2 per cent. of cereals, and 3 per cent. of water. It now claims it had the right to do this under the regulations in question as one to prevent the use of a false or deceptive name or label.

We are not claiming the right to sell this sausage, which contains cereal and water in excess of 2 per cent. and 3 per cent. respectively, under the name of "sausage," without any qualifying words. We are not objecting to that portion of the regulations in question which requires the presence on the label of

the words "cereal" and "water." We are contending for the right to manufacture a wholesome sausage of full food value, that complies with all such regulations or similar regulations, as to marks, labels and brands, which the department has heretofore prescribed, under authority of the Meat Inspection Law.

Such names or labels are, we insist, not false or deceptive, and any effort on the part of the Secretary of Agriculture to hold or prescribe them to be such, would constitute an arbitrary and unreasonable exercise of power under the Meat Inspection Act.

Congress has seen fit to establish one standard only, unwholesomeness. The Secretary of Agriculture without any pretense that the use of cereal in excess of 2 per cent. renders the product unwholesome, and apart from any question of label or name, attempted to fix an arbitrary standard as to the proportion of an ingredient which is to be used in the manufacture of sausage and by this arbitrary act to revolutionize the sausage business.

He refused to pass the product solely because of the presence of cereal and water in excess of 2 and 3 per cent.

There is nothing in the act, as we have said, which undertakes to prescribe the wholesome ingredients of food products, nor is any authority given the department to do so. Upon what ground, then, does the Secretary undertake to tell manufacturers what percentages of wholesome ingredients shall go into the manufacture of sausage? He now says that he does this to prevent the use of a deceptive name, but whatever the contents of the product may be, so long

as they are wholesome, the Secretary has the power only to see that the product bears a name that will clearly indicate the contents. His authority, so far as the provision against misbranding goes, is not to determine and limit the contents of the product, but to see that such contents appear in the name, so far as required by the act.

(a) THE SALE OF APPELLEE'S PRODUCTS AS "SAUSAGE WITH CEREAL ADDED," OR "SAUSAGE, CEREAL AND WATER," OR "SAUSAGE WITH CEREAL AND WATER ADDED," ETC., IS NOT FALSE AND DECEPTIVE.

As we have shown, under the Service Announcement of April 15, 1912, in force at the time of the promulgation of the regulation of February 28, 1913, the statement "*cereal added*" was required to appear on the labels in type "of such size as will be in good proportion to the name of the product," in case the product does not contain more than 5% of cereal, and if this percentage is exceeded, the word "*cereal*" must appear "*as a part of the name of the product in the same size and style type and on the same line; for example 'sausage and cereal.'*"

The evidence shows (Abst., 34) that up to the time of the adoption of the regulations of February 28, 1913, limiting the use of cereal to 2 per cent., appellee's practice had been to use in its manufacture of sausages from 2 or 3 to 10 per cent. of cereal, composed of corn flour, tested as to its purity and wholesomeness by appellee's chemists and by the Agricultural Department through its inspectors at appellee's plant.

The evidence further shows that for more than 50

years the general practice has been to use from two to ten per cent. of cereal as an ingredient of sausage. The usual percentage has been approximately five per cent., the amount of cereal depending upon the nature of the meat used in respect to its dryness and the extent to which it is composed of fat or lean. A meat product so made is sausage. The presence of such a percentage of cereal does not, and we submit, cannot be held or said to change it to something other than sausage. In view of the evidence showing the general and long continued use of cereal in the manufacture of sausage, there is no warrant for accepting the lexicographers definition of sausage as controlling or conclusive. A proper definition of the word now should include cereal as one of the ingredients. In any event it cannot, we submit, be said that it ceases to be sausage simply because a small amount of cereal is added.

The uncontradicted evidence shows (Abst., 35), that it had been the practice to label appellee's products, as above indicated, not only on the packages, but also on the links of sausage themselves, except in the case of small sausages, such as "wieners," linked together, in which case the stamp was placed on every third or fourth sausage. This method of labeling, it is clear, was not false, because it told the exact truth.

Nor was it deceptive in fact. There is not a particle of evidence in the record tending to show from any practical experience, or otherwise, that this method of labeling was deceptive, that is to say, that anyone was ever deceived thereby. The presence of cereal was so prominently and clearly stated that it seems

impossible to believe that it could escape notice or observation.

The regulations and service announcements, and the practice of the Bureau of Animal Industry, extending back from practically the beginning of the Act in 1906, can only be reconciled with the finding that this method of labeling was not false or deceptive. It seems inconceivable that the contrary should have been suddenly discovered. In any event, there is no evidence or explanation of the sudden change of attitude on the part of the Department, to indicate that this method of labeling had proven to be deceptive.

In fact the attempted justification of the regulation on the ground that cereal in excess of 2 per cent. rendered the product unwholesome, indicates that the department did not find this method of labeling to be deceptive, notwithstanding the preamble to the regulation.

The Court of Appeals, in the first appeal of this case (215 Fed. Rep. 553, 559), in holding it not to be deceptive, among other things said:

“The article in question, being sausage with cereal or sausage and cereal, was not intended to be prohibited by Congress. The act of Congress did contemplate, however, that the purchaser should know what he was buying. \* \* \* If such combination was sold as *sausage* it might be said to be sold under a false or deceptive name, as prohibited by the Meat Inspection Law, and, it might be said that another substance had been mixed or packed with it so as to lower or injuriously affect its quality or strength and that a substance had been substituted wholly or in part for the article as prohibited in the Pure Food Law; but when sold as

*sausage with cereal, or as sausage and cereal, none of these provisions would apply."*

And again it is said:

"It is claimed that the power existed to pass this regulation under the last portion of the fifth subdivision of the Meat Inspection Law (providing against the sale of meat food products under false or deceptive names), but this is an error. The subdivision in question prohibits a sale under any false or deceptive name and such it probably would be to sell a combination of sausage and cereal under the name of *sausage*, but not under the name of *sausage and cereal*."

And on the second appeal (242 Fed. 337), the Court of Appeals again held the same, saying, among other things:

"We held in this case on the former appeal that the Department had no right to forbid the use of the word 'sausage' on a compound in which it entered, provided the article was not sold under a false or fictitious name, and to that we adhere."

And again it was said:

"We have already held that the Secretary of Agriculture may by his control over the labels prevent the sale of sausage and cereal under any false or deceptive name, and in this sense his regulations are valid that sausage shall not contain over 2 per cent. of cereal; but he has absolutely no power to refuse to have 'passed' sausage and cereal which contains more than 2 per cent. of cereal, and if he has attempted to go further he has attempted to rewrite the act of Congress in his official capacity, and, if so, such assumption of authority by him is not conclusive on all the world."

So in the case of *Armour & Company v. Bird*, 159



Mich. 1, cited with approval by the Court of Appeals in this case (215 Fed. Rep. 553), the same was not only held by the court, but apparently conceded by all parties to the suit. In that case the product in question was "Armour's Devonshire Farm Style Sausage," meat made from the meat of hams and selected young pork, prepared with choicest spices and cereals and was claimed to be the highest production of the sausage making art.

The court among other things said:

"As manufactured by complainant, it contains from 2 to 10 per cent. of cereal. It is and has been for more than 40 years recognized in the trade as sausage. *When sold as sausage with cereal added, it deceives no one*, is not an imitation, and *manufacturers are entitled to manufacture and label it as sausage with cereal*. It is not contended that manufacturers have not the right to use the name 'sausage' when sold with a proper label."

And again:

"It is not contended that manufacturers of sausage have not the right to label their product 'sausage,' with the statement added that it is mixed with other products, specifying them."

And, in conclusion, the court said:

"Counsel for respondents conceded in the oral argument in this court that it was a wholesome food, and was entitled to sale in this state when sold under a proper label informing customers of what it is composed. It is conceded that the use of cereal requires more water than does sausage made with meat alone. Any one of intelligence would, upon reflection, know this to be the fact. The only doubt I entertain in the case is whether the label should, in addition to the words 'with cereal' contain also 'and water.' In view of the fact that water is generally used

in the manufacture of all sausage, and that no law or regulation of the food department has fixed the amount of water that may be used, it would seem like judicial legislation for the court to require the label to show that water is used in the manufacture. The statute does not require the label to state the proportion of the ingredients composing the mixture, but only the names of the ingredients.

It is within the power of the legislature to pass an act specifically providing for the manufacture and sale of sausage, and that the labels should state the proportions of the ingredients used. We hold a label '*sausage with cereal*' upon packages sold to consumers is a compliance with the statute in labeling the mixture, and a decree should be entered so stating."

- (b) NOR CAN THE SECRETARY OF AGRICULTURE MAKE OR HOLD BY REGULATION OR OTHERWISE THAT THE SALE OF APPELLEE'S PRODUCTS AS "SAUSAGE WITH CEREAL ADDED" OR "SAUSAGE, CEREAL AND WATER" OR "SAUSAGE WITH CEREAL AND WATER ADDED," ETC., IS FALSE AND DECEPTIVE, SINCE TO DO SO WOULD BE CONTRARY TO THE TRUTH AND FACT AND WOULD CONSTITUTE A MERE ARBITRARY AND UNREASONABLE EXERCISE OF POWER, NOT AUTHORIZED BY THE MEAT INSPECTION ACT AND NOT BINDING OR CONCLUSIVE UPON THE COURTS.

We shall show that the Secretary of Agriculture never determined the method of labeling we are considering to be false and deceptive, but, on the contrary, as we have shown, by a consistent course of practice, determined it to be proper and truthful. Nor did the promulgation of the regulation in question in this case involve, nor was it based upon any such determination.

Be that as it may, however, we contend, that any such determination by him would be, in the light of the foregoing considerations, unwarranted under the law and a mere arbitrary and unreasonable exercise of power, not binding or conclusive upon the courts.

There must be a limit to his power at some point. The Secretary of Agriculture himself probably would not contend that the addition of one-quarter per cent. or one-half per cent. or even one per cent. of cereal would justify him in prescribing by regulation that the name "sausage" or "sausage with cereal added," or "sausage and cereal," cannot be attached to the product. And if he did, there would probably be no serious contention that such a regulation would be reasonable and proper. Does the fact that he adopts the arbitrary percentage of two per cent. change the situation? We contend not. In view of the uncontroverted fact that the general practice has been for more than 50 years to use cereal in the manufacture of sausages in varying percentages, ranging from 2 to 10, with an average of approximately five per cent, we insist that the adoption of an arbitrary percentage of two per cent. is as unjustifiable as would be the smaller percentages we have suggested.

It is of course, fundamental that an arbitrary, unreasonable or clearly wrong exercise of power or discretion, vested in an administrative department, is not binding upon the courts and will not be sustained. In this connection we call the court's attention to the decision of the Court of Appeals, in this case (242 Fed. 343, 345) in which this question and the cases applicable to it were fully considered.

We submit that the Court of Appeals was entirely right in holding (242 Fed. 343) that the

"Secretary of Agriculture, may by his control over the labels, prevent the sale of sausage and cereal under any false or deceptive name, and in this sense his regulations are valid that *sausage* shall not contain over two per cent. of cereal; but he has absolutely no power to refuse to have 'passed' *sausage* and *cereal* which contains more than two per cent. of cereal, and if he has attempted to go further he has attempted to rewrite the Act of Congress in his official capacity, and, if so, such assumption of authority by him is not conclusive upon all the world."

(c) THE FORMER CONSTRUCTION OF SECTION 5 OF THE ACT BY THE DEPARTMENT SINCE 1906, HAVING RECOGNIZED THE RIGHT TO SELL SUCH PRODUCTS AS APPELLEE'S UNDER THE NAME SAUSAGE, WITH QUALIFYING WORDS, PRESCRIBED IN THE FORMER REGULATIONS AND SERVICE ANNOUNCEMENTS, AND HAVING THEREBY DETERMINED THAT SUCH NAME WITH QUALIFYING WORDS IS NOT FALSE OR DECEPTIVE, SUCH CONSTRUCTION OUGHT NOW TO BE HELD CONCLUSIVE.

The Act under which the regulation in controversy was adopted by the Secretary has been in existence since 1906. Until this regulation was adopted, the use of cereal and water in excess of 2 and 3 per cent., respectively, was recognized and approved by the Department. In other words, the Act was construed by the Department to allow the use of cereal and water in any quantity, *but to require appropriate labels to be affixed*. There was no question raised but that sausage with cereal and water added was a wholesome food product, and a legitimate article of trade, and that *the name sausage, with qualifying*

*words indicating the presence of cereal and water, was not false or deceptive.*

In Lewis Sutherland Statutory Construction, Section 472, it is said:

“A contemporaneous construction is that which it (a legislative act) receives soon after it is enacted. This after a lapse of time without change in that construction by legislation or judicial decision, has been declared to be generally the best construction. It gives the sense of the community as to the terms made use of by the legislature.”

The same author says further, in Section 474:

“If a particular construction has been acted upon for a number of years, the court will look with disfavor upon a change of the reconstruction by officials, especially when the parties who have acted on the faith of such construction will be prejudiced.”

In *U. S. v. Railway Co.*, 142 U. S. 615, 35 L. Ed. 1134, the Postmaster General had changed the construction of the postal appropriation act applying a reduced rate for the transportation of the mails by the appellee and thereby overruling the interpretation placed upon said act by his predecessors during a long term of years. On this subject the Supreme Court says:

“We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department a construction which, though inconsistent with the liberalism of the act, certainly consorts with the equities of the case—should be settled as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a

construction given to a statute by the department charged with the execution of such statute, and if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

Again, Lewis Sutherland Stat. Const.:

"All statutes for interference with legitimate industries or the ordinary uses of property, or for its removal or destruction for being a nuisance or contributory to public evil, are treated with conservative regard for the liberty of the citizen in his laudable business, and in the innocent enjoyment of his possessions, and generally the rights of property. Such interferences are cautiously justified on principles of the common law, and only in cases of imperative necessity, or under valid statutes plainly expressing the intent.

"The construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons."

*Heath v. Wallace*, 138 U. S. 573 (34 L. Ed. 1063).

*Hastings & Dakota Rd. Co. v. Whitney*, 132 U. S. 357, 33 L. Ed. 363.

## III.

THE REGULATION IN QUESTION IN THIS CASE DID NOT REGULATE, NOR IN FACT, AS THE EVIDENCE AND THE PREVIOUS CONTENTIONS OF APPELLANTS DISCLOSE, WAS IT INTENDED TO REGULATE OR CONTROL THE NAME OR LABEL TO BE ATTACHED TO OR PUT UPON SAUSAGES CONTAINING MORE THAN 2 PER CENT. OF CEREAL AND 3 PER CENT. OF WATER, NOR DID IT ANNOUNCE THAT THE NAME OR LABEL "SAUSAGE WITH CEREAL ADDED" OR "SAUSAGE, CEREAL AND WATER" OR "SAUSAGE WITH CEREAL AND WATER ADDED," SHOULD NOT BE ATTACHED TO OR PUT UPON SUCH PRODUCTS, AND HENCE THE REFUSAL TO MARK APPELLEE'S PRODUCTS "INSPECTED AND PASSED" CANNOT BE JUSTIFIED BY THE REGULATION OR OTHERWISE.

The provision of Section 5 of the Act that is applicable to this case is, that "No such meat or meat food products shall be *sold* or offered for *sale* by any person etc., *under any false or deceptive name,*" etc.

The following observations suggest themselves in connection with this provision:

*First.* It applies to and is a prohibition against the *sale* and *has no application to the manufacture or preparation of meat food products.*

*Second.* It is a prohibition against the *sale* "*under any false or deceptive name.*"

It is clear, beyond doubt, that this provision is not intended to regulate the quality or to prescribe the ingredients or combination of the meat product.

The regulations which the Secretary of Agricul-

ture is authorized to make under Section 19 of the Act "for the efficient execution of the provisions" of the Act, must, of course, be limited to and strictly germane to the object above defined.

The first sentence of Par. 1 of Section 16, reading "Sausage shall not contain cereal in excess of 2 per cent.," is a single and complete sentence and, absolutely prohibits the *manufacture* of any kind of sausage which contains more than 2 per cent. of cereal.

Par. 2, reading, "Water or ice shall not be added to sausage," \* \* \* to "exceed 3 per cent.," prohibits the *manufacture* of sausage with more than 3 per cent. of water or ice, except as provided in Par. 3, "sausage of the class which are smoked or cooked such as Frankfurt style, Vienna style and Bologna style."

These regulations, thus far, do not in fact have, nor do they purport to have, anything to do with the *name* under which sausage may be *sold*. They are directed to the *preparation* or *manufacture* of sausages.

Nor are they even germane to the preamble of the regulations in question, which recites that the regulations are adopted "for the purpose of forbidding the use in interstate or foreign commerce of meat or food products *under any false or deceptive name*."

Regulations to be within the scope of and germane to Section 5 and this preamble must relate to the use of the *name* under which a meat product is *sold*, as distinguished from the *manner* it is *made* or *prepared*, and must be designed, in some way, to define, limit or prescribe the *name* that may be used



in connection with a meat product *so that it shall not be false or deceptive.*

Thus, for example, such a regulation, to be germane, would be permitted to prescribe that a meat product put out and sold as sausage should not be sold under the name "sausage" alone, if it contains more than a prescribed amount of cereal or water, or both, or that a meat product put out and sold as sausage, containing more than a prescribed amount of cereal or water, or both, may be sold under the name "sausage" with the added words "cereal and water," or "sausage, cereal and water," or "sausage containing (a defined percentage) of cereal or (a defined percentage) of water"; or, in other words, under names or combinations of words such as, or similar to those prescribed by the prior regulations and service announcements, which were strictly germane to Section 5 of the Act.

The Secretary of Agriculture, however, cannot, under the guise of a regulation promulgated under Section 5, absolutely prohibit the manufacture and sale of a wholesome meat product containing, as in the case at bar, more than 2 per cent. of cereal and 3 per cent. of water.

And in harmony with these contentions the Court of Appeals in this case (242 Fed. Rep. 343) said:

"We have already held that the Secretary of Agriculture may by his control over the labels prevent the sale of sausage and cereal under any false or deceptive name, and in this sense his regulations are valid that *sausage* shall not contain over 2 per cent. of cereal; but he has absolutely no power to refuse to have 'passed' *sausage and cereal* which contains more than 2 per cent. of cereal, and if he has attempted to go

further he has attempted to rewrite the Act of Congress in his official capacity, and, if so, such assumption by him is not conclusive on all the world. If he wants a law which will enable him to prepare formulas further than the present law does, he may or may not succeed in modification of the existing law."

The second sentence of Par. 1 of the regulation reads: "When cereal is added its presence shall be stated on the label or on the product." This means of course, that when cereal *not* in excess of 2 per cent. is added, its presence shall be so stated and this is the construction put upon it by the Department.

This, however, makes no provision and does not purport to make provision in case the cereal *exceeds* 2 per cent. and the water exceeds 3 per cent.

Having absolutely prohibited the manufacture of sausage with cereal in excess of 2 per cent., and water in excess of 3 per cent., and having provided that the presence of cereal shall be stated on the label or product if cereal *not* in excess of 2 per cent. be used, no provision whatever is made defining, prescribing or limiting the name or names that may be used in connection with a product commonly known as "sausage," when the cereal and water *exceeds* 2 per cent. and 3 per cent. respectively.

While the regulation provides that in case cereal *up to* but *not* in excess of 2 per cent. be used, its presence shall be stated on the label or product, it does not purport to say that in case cereal *in excess* of 2 per cent. and water *in excess* of 3 per cent. be used, it may not be sold under the name "sausage" with qualifying words, such, for example, as "sau-

sage with cereal added," or "sausage, cereal and water," or "sausage with cereal and water added."

There is then that variety of food products, such as appellee's, commonly known as sausage, containing *in excess* of 2 per cent. of cereal and 3 per cent. of water, (the manufacture and sale of which cannot be prohibited because perfectly wholesome), that are not covered by the regulations in question or any other regulations as to name or label.

(a) SECTION 16 OF THE REGULATIONS OF FEBRUARY 28, 1913, CANNOT BE CONSTRUED TO MEAN THAT CEREAL IN EXCESS OF 2 PER CENT. AND WATER IN EXCESS OF 3 PER CENT. MAY BE USED IN THE MANUFACTURE OF SAUSAGE, PROVIDED THE WORD "SAUSAGE" BE NOT USED IN THE NAME OR LABEL, OR THAT THE WORD "SAUSAGE" SHALL NOT BE USED IN THE NAME OR LABEL IF THE PRODUCT CONTAINS CEREAL IN EXCESS OF 2 PER CENT., OR WATER IN EXCESS OF 3 PER CENT. THE REGULATION WAS INTENDED BY THE SECRETARY OF AGRICULTURE TO PROHIBIT ABSOLUTELY THE MANUFACTURE OF SAUSAGE WITH CEREAL IN EXCESS OF 2 PER CENT. AND WATER IN EXCESS OF 3 PER CENT. AND HENCE THERE WAS NO OCCASION TO PROVIDE AND THE REGULATION WAS NOT INTENDED TO PROVIDE FOR ANY NAME OR LABEL THAT MIGHT BE APPLIED TO SAUSAGE WITH CEREAL AND WATER IN EXCESS OF THESE PERCENTAGES, AND WAS SO CONSTRUED BY THE DEPARTMENT.

We presume the contention will be, although this has not been made clear, that the effect and proper construction of the regulation, providing that sausage shall not contain cereal in excess of 2 per cent., and that when it does contain cereal not in excess of 2 per cent. its presence shall be stated on

the label or on the product, is that when cereal *in excess* of 2 per cent., and water *in excess* of 3 per cent., is used, the word "sausage" shall not be used in the name or label. In his dissenting opinion Judge Amidon said it should be made to read, "The name 'Sausage' shall not be used upon any package containing a meat food product if the product contains cereal in excess of 2 per cent. or added ice or water in excess of 3 per cent."

But the regulation does not say so. It simply says that if cereal *not* in excess of 2 per cent. be contained in sausage, its presence shall be stated on the label or product. The antecedent sentence, that sausage shall not contain cereal in excess of 2 per cent. cannot be invoked to sustain this construction. This sentence has nothing to do with the name, but applies solely to the preparation or ingredients of a product commonly known as sausage, and was so construed by appellants. The word sausage, as used in this sentence, was used merely as a noun to refer to or designate the article or product. It was not used as a name to be or not to be put upon the product or on the label.

As we have pointed out, this is not the construction that the Secretary of Agriculture on the trial, and in the attempted enforcement of this regulation, put upon it himself. On the contrary, he insisted that the regulation altogether prohibited the manufacture of sausages with cereal in excess of 2 per cent., and justified his construction of it and his action under it, on the ground that sausage with such excess, is unwholesome. This being true, it is clear that he never intended this regu-

lation, (if promulgated by him under Section 5, to prevent the use of a false or deceptive name, as he now contends), to regulate the names of such products as appellee's, containing cereal or ice *in excess* of 2 and 3 per cent. respectively, since he never intended they should be made at all; but, at most, to regulate the name of such products when they contained *not in excess* of 2 per cent. of cereal and 3 per cent. of water.

That this was his design and purpose is expressly pointed out by the Court of Appeals on the first appeal, the court saying (215 Fed. 553): "We come now to the provision inserted in Section 16 of Rule 18 that sausage shall not contain cereal in excess of 2 per cent. If this simply means that it shall not be sold as sausage, it possibly may have been valid; *but the government does not contend that this is its true meaning. \* \* \** But the contention is that the Secretary of Agriculture had power to prohibit the manufacture and sale of sausage and cereal, where the cereal was in excess of 2 per cent."

Can the regulation now be given a construction that is contrary to the construction given it by the Department of Agriculture itself? Having promulgated the regulation, it certainly knew best what it meant and was intended to cover and accomplish.

If such a construction be now contended for it will be the construction given it by the counsel in the case to meet its necessities and not the construction given it or the meaning intended for it by the Department upon its adoption.

We contend the regulation is not subject to the construction suggested, but means exactly what it

says, namely, that no product commonly known as "sausage" shall be made to contain more than 2 per cent. of cereal, or 3 per cent. of water, and in view of this prohibition (which appellants sought to enforce solely because appellee's products contained cereal and water in excess of these percentages), there was no occasion to provide, by regulation, or otherwise, for any name or label that might be applied to sausage with cereal and water in excess of these percentages, since it was the design of the Secretary of Agriculture and his purpose under the regulation to prevent any such meat product from being made.

And in this connection we call the court's attention to the follownig considerations in support of these contentions.

Under Bureau of Animal Industry Order 150, effective May 1, 1908, constituting the regulations governing the meat inspection of the United States Department of Agriculture, Regulation 18 governed "Trade Labels" only, and is so designated.

Regulation 18 was adopted for the purpose of making Section 5 of the Meat Inspection Act effective, and was confined in its 14 sections entirely to regulations governing "Trade Labels" and trade names under which meat or meat food products were permitted to be sold.

Thus Section 5 of Regulation 18 prescribes the essential features of a trade label; Section 10 regulates the use of trade names, Section 11 governs the use of pictures, designs and devices upon labels, and so on.

Regulation 18, with the 14 sections above referred

to, continued in force until February 28, 1913, when Amendment 4 to Bureau of Animal Industry Order 150 was adopted, and which amended Regulation 18 by the addition of Sections 15 and 16, being the sections in question in this case. The preamble of the regulation of February 28, 1913, recited, as has already been pointed out, that it was adopted for the purpose of preventing the use in interstate or foreign commerce of meat or meat food products "*under any false or deceptive name.*"

After this suit had been instituted and the demurrer to the bill had been argued, the Department of Agriculture on July 30, 1914, issued a complete revision of the regulations governing the inspection of meat, to become effective November 1, 1914, and in this revision the preamble of the regulation of February 28, 1913, was wholly omitted and the words "Sausage shall not Contain Cereal in excess of 2 per cent." were incorporated in Regulation 18 of the Revised Regulations, which is headed "Reinspection and Preparation of Meat and Meat Products," and not "Trade Labels," as was Regulation 18 of the prior regulations, and the words "When cereal is added its presence shall be stated on the label or product" were incorporated in the regulation headed "Trade Labels," etc., in substantially the same words. In this revision, Sections 15 and 16 were made to read as follows:

"Par. 4. Sausage shall not contain cereal in excess of 2 per cent."

"Par. 5. Water or ice shall not be added to sausage, except for the purpose of facilitating grinding, chopping, or mixing, in which case the added water or ice shall not exceed 3 per cent., except that sausage of the class which are

smoked or cooked, such as Frankfort style, Vienna style and bologna style, may contain added water in excess of 3 per cent., but not in excess of an amount necessary to make the article palatable.

Par. 6. No compound, lard substitute, or lard compound, shall contain added water."

It will thus be seen that the Bureau of Animal Industry itself recognizes that, in any event, the first part of the regulation, reading "Sausage shall not contain cereal in excess of 2 per cent.," could not be and was not intended to be based upon Section 5 of the Act, governing the use of deceptive names.

And appellants below practically conceded this contention. In the brief of appellants on the second appeal, it was said that—

*"after that opinion, but before service on him, the defendant Houston canceled the order referred to, and promulgated a new order which omitted all reference to 'false or deceptive names'.*

*"It would seem that the necessary implication from the refusal to base the new order upon the false or deceptive name portion of the statute is that it was intended to base the new order upon the only other portion of the statute possible, namely, 'the sound, healthful or wholesome clause'."*

And it is then said:

*"The construction of B A I Order 211 urged is strengthened by the specific denial in the defendant Houston's answer, that the product is sound, healthful or wholesome."*

Appellants contended on the second appeal that the regulations of November 1, 1914, have superseded those of February 28, 1913, and that the case



must now be determined on the basis of the new regulations.

Without conceding this to be true, let us assume for the purposes of argument that it is. Then we have the following situation:

The regulation providing "sausage shall not contain cereal in excess of 2 per cent." now placed where it properly belongs, namely, in that part of the general regulations governing the *manufacture* of meat food products, to insure wholesomeness, and standing by itself, as it now does, is a single and complete regulation. Its sole purpose and effect is to regulate the *preparation* or *ingredients* of meat food products commonly known as "sausage," and as such it prohibits the making of such product with cereal in excess of 2 per cent. or water in excess of 3 per cent.

This was the construction put upon it by appellants in the trial court and in the Court of Appeals, as we have just pointed out, and as we have shown, was, also, the construction put upon the regulation of February 28, 1913. And as such, appellants justified their refusal to pass appellee's products on the ground that they were unwholesome, entirely apart from the matter of name or label. But, as we have shown, this regulation is void, because it prohibits the manufacture of perfectly wholesome food products, such as appellee's, which the Secretary of Agriculture had no power to do.

If, then, it be void, as we contend, it follows that the other part of the regulation providing that "When cereal is added, its presence shall be stated on the label or on the product," now found in the new

regulations under the head of "Trade Labels," and reading, "When cereal is added to sausage within the limits prescribed by Paragraph 4 of Section 6 of Regulation 18 (being the regulation just referred to), there shall appear on the label in a prominent manner, contiguous to the name of the product, the statement 'cereal added,' " is wholly without force or effect, since Paragraph 4 of Section 6 being void, there is nothing for this regulation to apply or relate to. It follows, therefore, that there is no regulation whatever governing the matter of labeling or naming sausages with or without cereal, and upon which appellants can justify their refusal to "pass" appellee's confessedly wholesome products on the ground of a deceptive name or label, or otherwise.

(b) IN ANY EVENT, THE MOST THAT CAN BE SAID FOR SECTION 16 UNDER ANY PROCESS OF REASONING, IT SEEMS TO US, IS THAT IT FINDS THE NAME "SAUSAGE," WHEN APPLIED ALONE, WITHOUT THE QUALIFYING WORDS "CEREAL OR WATER" TO PRODUCTS SUCH AS APPELLEE'S, TO BE FALSE AND DECEPTIVE. IT CANNOT BE SAID TO DETERMINE THAT THE NAME OR LABEL "SAUSAGE WITH CEREAL ADDED," OR "SAUSAGE, CEREAL AND WATER," OR "SAUSAGE WITH CEREAL AND WATER ADDED," IN ACCORDANCE WITH THE THEN EXISTING REGULATIONS AND SERVICE ANNOUNCEMENTS, IS FALSE OR DECEPTIVE.

In the light of the foregoing considerations, therefore, it is clear, we contend, that the refusal of appellants to mark appellee's products "Inspected and Passed" was not based upon, or justified by, any regulation. But without some regulation to guide and govern the inspectors in determining under what

label, name or combination of names or words a meat food product like appellee's might be sold, and "Passed," appellants had no right to refuse to pass appellee's products.

This is true because Sections 4 and 5 of the Act are not self-executing. Section 19 of the Act provides that the Secretary of Agriculture *shall*, from time to time, *make such rules and regulations* as are necessary for the efficient execution of the provisions of the Act, and that "*all inspection and examinations made under this Act shall be such, and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture.*" This language is clear and unambiguous, and means exactly what it says, namely, that the inspectors are to be guided and governed *solely* by regulations, and that they can act only "*in such manner as described in the rules and regulations.*" In other words, they cannot take the act itself, and give it their individual constructions, and base their actions thereon, and it is clear that Congress never intended them to do this. This is true because there are thousands of inspectors employed and charged with the enforcement of the Act. Unless they are governed and guided and limited in their actions by *uniform rules and regulations*, every inspector would be a law unto himself, and every establishment might have as many varied constructions and enforcements of the law as there are inspectors engaged therein.

Section 5, simply prohibiting the sale of meat food products under any false or deceptive name, one inspector might determine a given name to be false and deceptive, and another that it is not. One in-

spector might require a certain modification of a submitted name, and another inspector require another and different modification, and so on.

The regulation in question in this case not being designed or effective to regulate the name or label in case a product known as sausage contains *more* than 2 per cent. of cereal and 3 per cent. of water and there being no other regulation promulgated to regulate, define, prescribe or limit the name or names that might or might not be used on products commonly known as "sausage" having cereal *in excess* of 2 per cent. and water *in excess* of 3 per cent., inspectors could not act, nor refuse to mark appellee's products "Inspected and Passed."

#### IV.

THE SECRETARY OF AGRICULTURE HAS NOT, AS IS CONTENDED, DETERMINED BY THE ADOPTION OF THE REGULATIONS IN QUESTION THAT THE SALE OF APPELLEE'S PRODUCTS "AS SAUSAGE WITH CEREAL ADDED," OR "SAUSAGE, CEREAL AND WATER," OR "SAUSAGE WITH CEREAL AND WATER ADDED," IS FALSE OR DECEPTIVE AND IF HE HAD, THIS DETERMINATION WOULD NOT BE CONCLUSIVE UPON THE COURTS, FOR THE REASONS POINTED OUT IN DIVISION II OF OUR BRIEF AND ARGUMENT.

Counsel for Appellant say (Brief, 20):

"Congress has enacted that food articles of this kind shall not be sold except under names approved by the Secretary of Agriculture, who has refused to approve any name for appellee's product which contains the word "sausage" upon the ground that it will be false and deceptive."

This, it is said, "is conclusive of that question of fact," and "the question is not now open to review" because "the determination of the question whether a particular name when applied to a particular article is false and misleading, has, as we have seen, been committed by Congress to the Secretary of Agriculture."

The alleged determination of an administrative department ought not to be held binding, unless, in any event, it appears clearly and unmistakably that such determination was made. This does not appear in the case at bar. The language, purpose and effect of the regulation does not give rise to this inference. As we have pointed out, it regulates the manufacture and ingredients of the product. It does not purport, and, as we have shown, it was not intended by the Department, to regulate the sale of the product, or the name or label to be attached to it, *except incidentally as to the product not prohibited*.

The difficulty, however, with the foregoing contentions of counsel is that they are not founded on the facts or the evidence.

In the first place, as we have shown, the record discloses, that the Secretary of Agriculture did not refuse to pass appellee's products because of any mark or label upon them containing the word "sausage," but on the ground, admitted by paragraphs 10 and 11 of Appellants' Answer, that they contained in excess of 2 per cent. of cereal and 3 per cent. of water and were in consequence unwholesome. And appellants sought to sustain their right to do this by an attempt to prove on the trial, although unsuccessfully, as the record in this case discloses, that ap-

pellee's products were unwholesome within the meaning of Section 4 of the Act.

It is true that in paragraph 30 of Appellants' answer, it is alleged that "the manufacture and sale of a product *as sausage*," which contains from 2 to 10 per cent. or in excess of 2 per cent. of cereal, is false and deceptive. It is not alleged, however, that the refusal to pass appellee's products was based on this, but, as we have said, paragraphs 10 and 11 of appellants' answer expressly admitted, that the refusal was based on the excess of cereal and water.

Furthermore this is beside the question or issue in the case, since appellee did not assert and does not now claim the right to sell such product as *sausage*, but only as sausage with cereal added, or sausage with cereal and the like, indicating the presence of cereal. The answer does not say that so named or labeled it is false and deceptive. It says only that if sold merely as sausage, it is false and deceptive.

In the second place, the Secretary of Agriculture did not, by the adoption of Section 16 of the regulations, determine that the names applied to appellee's products, containing cereal and water *in excess* of 2 and 3 per cent. respectively, were false and misleading, because, as we have seen, this regulation has to do with the manufacture and ingredients of the products in question, and does not have anything to do with the name affixed, or to be affixed, thereto, and under which they may be sold, except only in the event they contain not in excess of 2 and 3 per cent. of cereal and water respectively. And, as we have pointed out and as the Court of Appeals on the first appeal found, this was the construction the Department of Agriculture put upon the regulation. How

then can it now be claimed that the Secretary of Agriculture has determined that any name for appellee's products which contains the word "sausage" is false or deceptive.

## V.

THE EFFECT OF THE REGULATIONS IN QUESTION, ASSOUGHT TO BE ENFORCED, IS TO PROHIBIT ALTOGETHER THE MANUFACTURE AND SALE OF SAUSAGES CONTAINING CEREAL IN EXCESS OF 2 PER CENT. AND WATER IN EXCESS OF 3 PER CENT., AND THIS IS BEYOND THE POWER OF THE SECRETARY OF AGRICULTURE.

The inspectors refused to mark the meat product of appellee, commonly known as "sausage," with cereal in excess of 2 per cent., and water in excess of 3 per cent., "Inspected and Passed," and thus prevented the shipment and sale of the same altogether, notwithstanding they were marked in accordance with the prior regulations and service announcements.

As the regulations of the Agricultural Department now stand, no provision whatever is made or none exists for the labeling and sale of the product commonly known as "sausage" containing cereal in excess of 2 per cent. and water in excess of 3 per cent.

The Secretary of Agriculture, having prescribed that sausages should not contain cereal in excess of 2 per cent., nor water in excess of 3 per cent., had no right to refuse to mark appellee's products "Inspected and Passed" and rest there, thus barring them from interstate commerce. He was, in any event, we submit, required, in case such a meat product is wholesome and fit for human food, such as ap-

pellee's is proved and conceded to be, to go further and adopt additional regulations, in some way, defining, prescribing or limiting the name under which such a product, containing more than 2 per cent. of cereal and 3 per cent. of water, might be "passed" and sold. This, however, has not been done, and there is no regulation to cover the situation.

*Our contention, therefore, is that, assuming to act under this regulation, the Secretary of Agriculture attempts to outlaw a class of property, to-wit, sausage containing more than 2 per cent. of cereal, which is wholesome food and lawful property under the terms of the Act, and this is beyond his power.*

He does this by promulgating a regulation "to prescribe standards of quality," and "formulas," which the Court of Appeals in this case, in 215 Fed. 559, said, "it was not the design of Congress in that law" to do and which, in 242 Fed. 341, it said, "is an attempt to make the act of Congress do just what Congress had no thought of doing."

The case of *U. S. v. 11,150 Pounds of Butter*, 115 C. C. A. 463, is in point. In that case this court condemned as invalid a regulation of the Department which prescribed a fixed percentage of moisture in butter, although Congress had provided that any butter should be regarded as adulterated "in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk or cream." The regulation promulgated by the Secretary was that "butter having sixteen or more per cent. of moisture contains an abnormal quantity." This regulation was held to go beyond the statute in that it condemned butter containing



16 per cent. of moisture, whereas the statute limited the application of the word "abnormal" to moisture which was caused to be absorbed by manipulation or the method of manufacture, so that under the statute butter might *lawfully contain* a quantity of moisture (not the result of manipulation) which under the regulation would be unlawful. So here, under the Act of Congress, sausage containing five per cent. of cereal is lawful if the product is wholesome; under the regulation the same product is unlawful. In the butter case this court said:

"Implied authority in an executive officer or department to repeal, extend, or modify an act of Congress may not be lawfully inferred from authority to enforce it, and a regulation of the Secretary of the Treasury, or any other executive officer, made under legislative authority to make rules to enforce an Act of Congress, which has the effect to subject classes of property to forfeiture and classes of persons to fines and penalties under the Act, that are excluded therefrom by the terms of the law, is unauthorized and void."

The court further held in that case that although the law forbade the presence of an abnormal quantity of moisture (induced by manipulation in the manufacture) in unadulterated butter, yet the Secretary had no power to fix the measure of an abnormal quantity of moisture in butter, because no such power was delegated to him by Congress and for the further reason that the quantity of moisture in butter varies with the place, season of the year, climate and other circumstances, and hence there could be no fixed standard of normal moisture.

So here it appears by the evidence that the amount of cereal used varies from two to ten per cent. de-

pending upon the kind of sausage in process of manufacture, there being a large variety of sausage produced by appellee, requiring the use of cereal and water in varying proportions.

The case before the court as made by the bill and the evidence is stronger against the authority of the Secretary than the butter case. Here Congress has not legislated at all upon the subject of the use of cereal and water as ingredients of sausage. The Act affords no basis whatever for the attempted limitation upon the use of these ingredients.

In the Butter case the opinion cites with approval the following cases, among others:

*Williamson v. U. S.*, 207 U. S. 425, 52 L. Ed. 278, which arose upon a regulation promulgated by the Department acting under the Timber and Stone Act, requiring an affidavit which was not required by the Act of Congress. The court held the regulation invalid upon the ground that the Secretary could not adopt rules destructive of rights given by Congress in the Act.

*U. S. v. Copper Co.*, 196 U. S. 207, 49 L. Ed. 449, involved a regulation forbidding the use of timber, from a Government reservation, for roasting ore. The regulation construed the Act of Congress, which permitted use of timber for "domestic" purposes, to exclude roasting ore. The court held that roasting ore was a domestic use, that the regulation was invalid, that the Secretary cannot give final construction to an Act of Congress by a regulation.

The court says:

"If Rule 7 is valid the Secretary of the Interior has power to abridge or enlarge the stat-

ute at will. If he can define one term he can another. If he can abridge he can enlarge. Such power is not regulation, it is legislation. \* \* \* Congress has \* \* \* entrusted to the Secretary the power to regulate the exercise of the license, not to take it away."

In the case at bar Congress gives the right to manufacture wholesome meat products under a non-deceptive name. This right is taken away by the regulation which forbids the manufacture of a wholesome meat product *under any name, or no name at all*. Suppose we sell it without any name, what right have they to interfere unless it is unwholesome? Under the evidence, this regulation, if valid, forbids the use of any cereal in sausage, because, as alleged, cereal cannot be used with only three per cent. water. If this regulation is valid, the Secretary may forbid the use of other ingredients, such as sage and spices, or determine the quantity thereof; yet the amount and character of the ingredients have no relation to a deceptive name, since the Secretary has power to require the use of a name that shall fully and fairly indicate the contents of the article manufactured.

*Morrill v. Jones*, 106 U. S. 466, 27 L. Ed. 267. This case arose upon the Act of Congress admitting free from duty animals imported for breeding purposes. The Secretary, by regulation, limited the application of the law to animals of "superior stock;" held:

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of procedure to carry into effect what Congress has enacted \* \* \*. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This

is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe \* \* \*. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law."

Adopting and paraphrasing the language of Judge Sanborn in the fourth paragraph of the opinion in the above cited Butter case (p 473), we say that if Congress had expressly empowered the Secretary to investigate, to ascertain, to determine and then by general regulation to define and fix the amount of cereal or other ingredients in sausage, there would be authority to sustain such regulation.

*U. S. v. Grimaud*, 220 U. S. 506, 55 L. Ed. 563.

In the absence of such express authority the limit of his power seems to be to decide whether the product is wholesome and to determine and require a non-deceptive name to be affixed thereto.

The Grimaud case, *supra*, reviews the cases which hold that when Congress has indicated its will in a general enactment it may give to an administrative officer "power to fill up the details" by the enactment of administrative rules and regulations. Reference is made in the opinion to the law which forbids discriminatory rates, and gives to the Interstate Commerce Commission authority to determine reasonable rates, and to administer the law against discrimination, also the law which requires the use of drawbars of a uniform height, and left to the Commission the administrative duty of fixing a uniform standard. Also the laws forbidding the obstruction of navigable streams, to sell unbranded

oleomargarine or to import unwholesome teas, allowing the executive officers to make rules and regulations appropriate to the matters covered by the various acts.

The court, in commenting on these cases, said:

“But in making these regulations the officers did not legislate, they did not go outside the circle of that which the Act itself had affirmatively required to be done or treated as unlawful if done. But confining themselves within the field covered by the statute, they could adopt regulations \* \* \* in order to administer the law and carry the statute into effect.”

If the regulation condemned cereal and water on the ground that they were unwholesome, the case of *Buttfield v. Stranahan*, 192 U. S. 470, might perhaps be cited as authority to sustain such a regulation, but inasmuch as the regulation is based upon the authority given by the Act to prevent a deceptive name, it amounts to an arbitrary exercise of power, and violates the principle laid down in that case.

## CONCLUSION.

To summarize our essential contentions, therefore, we insist:

*First.* That the regulations in question cannot be sustained under Section 4 of the Act, and appellants have no right to refuse to mark appellee's products “Inspected and Passed” under a regulation based upon this section, because appellee's products are conclusively shown, and are conceded to be, wholesome.

*Second.* That the sale of appellee's products under the names or labels we have suggested, and such

as are prescribed in the regulations and service announcements in force at the time of the promulgation of the Regulations of February 28, 1913, are not false or deceptive within the meaning of the Act, and the Circuit Court of Appeals was right in so holding.

If this be true, the regulations in question cannot be sustained under Section 5 of the Act.

*Third.* If the regulations in question were intended or be construed to prescribe that in case cereal in excess of 2 per cent., and water in excess of 3 per cent. be used in the manufacture of sausage, the word sausage shall not be used in the name or label, or in other words that the name or label "sausage with cereal added," or "sausage, cereal and water" or "sausage with cereal and water added," or similar names or labels, included the word sausage with added words indicating the presence of cereal or water, should not be attached to or put upon such products as appellee's, then the regulations are arbitrary, unreasonable and beyond the authority of the Secretary of Agriculture, under the Meat Inspection Act.

*Fourth.* In any event, the regulations in question, under any proper or permissible construction that can be put upon them, do not and were not intended to regulate and control the name or label to be attached or put upon sausages containing *more* than 2 per cent. of cereal and 3 per cent. of water, or, specifically, they did not prescribe that the name or label "Sausage with cereal added," or "Sausage, cereal and water," or "Sausage with cereal and water added," or similar names or labels, including the word "sausage" should not be attached to or put upon such products

as appellee's, and hence the refusal to mark appellee's products "Inspected and Passed" cannot be justified by the regulation, or otherwise.

We respectfully submit, therefore, that the decree in this case must be affirmed.

Respectfully submitted,

ALEXANDER F. REICHMANN,

ABRAM B. STRATTON,

*Solicitors for Appellee.*

Opinion of the Court.

HOUSTON ET AL. v. ST. LOUIS INDEPENDENT  
PACKING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE  
EIGHTH CIRCUIT.

No. 264. Argued March 20, 1919.—Decided April 14, 1919.

Under the Meat Inspection Act, the Secretary of Agriculture is authorized to prohibit the use of the word "sausage" as false and deceptive, when applied to a compound of meat, with added cereal in excess of 2 per cent. and added water or ice in excess of 3 per cent. P. 483.

The act does not require the Secretary to mark a meat-food product "inspected and passed" merely because it is wholesome and free from dyes and chemicals, if it is to be sold under a deceptive name. P. 484.

Whether the name "sausage" is deceptive as applied to a compound of meat with added cereal and water is a question of fact which the statute submits to the determination of the Secretary, under the power it gives him to make rules and regulations for carrying it into effect, and his decision, when fairly arrived at on substantial evidence, is conclusive. *Id.*

242 Fed. Rep. 337, reversed.

THE case is stated in the opinion.

*Mr. Assistant Attorney General Frierson*, with whom *Mr. Charles S. Coffey* was on the brief, for appellants.

*Mr. Alexander F. Reichmann*, with whom *Mr. Abram B. Stratton* was on the brief, for appellee.

MR. JUSTICE CLARKE delivered the opinion of the court.

The Secretary of Agriculture, assuming to exercise authority under the "Meat Inspection" Act, approved



June 30th, 1906, c. 3913, 34 Stat. 669, 676, 678, promulgated a regulation, effective April 1st, 1913, in part as follows, viz:

"Washington, D. C., Feb. 28, 1913.

"For the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive name, under the authority conferred on the Secretary of Agriculture by the provisions of the act of Congress, approved June 30, 1906 (34 Stat. 674), Regulation 18 is hereby amended by the addition of sections 15 and 16, to read as hereinafter set out.

James Wilson,  
Secretary of Agriculture.

"(Section 16, paragraph 1.) Sausage shall not contain cereal in excess of two per cent: When cereal is added its presence shall be stated on the label or on the product.

"(Paragraph 2.) Water or ice shall not be added to sausage, except for the purpose of facilitating grinding, chopping and mixing, in which case the added water or ice shall not exceed three per cent., except as provided in the following paragraph."

Immediately after the effective date of this regulation the appellee, an extensive manufacturer of sausage, correctly interpreting it as prohibiting the marking, stamping or labeling as "sausage" any compound of chopped or minced meats containing cereal in excess of two per cent. and water or ice in excess of three per cent. (except as otherwise provided), filed the bill in this case in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, averring that "sausage" made by it with cereal and water in excess of the requirements of the regulation was wholesome and fit for human food and that the effect of the order would be to exclude its product from interstate commerce, to its great and irreparable damage. The prayer was that

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the defendants, the Secretary of Agriculture and the officers subordinate to him, be enjoined from refusing to mark as "Inspected and passed" all "sausage" manufactured by the petitioner found to be sound, healthful, and wholesome, and which contained no dyes, chemicals, preservatives or ingredients which would render such "sausage" unsound, unwholesome or unfit for human food; that they be required by mandatory injunction to mark such "sausage" as "Inspected and passed," and that the regulation be declared to be unauthorized by law, null and void.

The District Court denied the application, on the bill, for an injunction (204 Fed. Rep. 120), but on appeal that holding was reversed and the case was remanded by the Circuit Court of Appeals (215 Fed. Rep. 553).

The Secretary of Agriculture then answered admitting that it was the purpose of the Department to refuse, and that it had refused, to mark as "Inspected and passed" as "sausage" the product of the appellee unless manufactured in compliance with the regulations complained of, and, as warrant therefor, he quoted in his answer from the act of Congress the following:

*"No such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted,"* and that "said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this Act, and all inspections and examinations made under this Act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture not inconsistent with the provisions of this Act."

Answering the allegation of the bill that the appellee's trade in "sausage" would be ruined by the enforcement of the regulation, the Secretary of Agriculture averred that the appellee manufactured and sold large quantities of sausage which did not contain any cereal or added water, and added:

"That the manufacture and sale of a product as sausage which product contains added cereal and water in quantities as described in plaintiff's bill, or in any quantities in excess of the amount designated in said regulation, effective April 1, 1913, is false and deceptive; that the ordinary consumer of sausage manufactured by this plaintiff has no knowledge or information that sausage contains cereal and added water, that such information is not conveyed to persons who purchase plaintiff's sausage at retail by any method of marking or branding now or heretofore in use by plaintiff, and that it is impracticable and impossible in the ordinary course of manufacture and distribution of sausage to mark or brand the same so that the purchaser at retail or the consumer will be informed as to the amount of cereal and water added thereto."

An elaborate trial on the merits resulted in the dismissal of the bill by the District Court, but this judgment was reversed by a divided Circuit Court of Appeals and the case was remanded with directions to award the appellee injunctions substantially as prayed for. The case is here for review on appeal.

The claim made by the Government in the lower courts that the compound of meats, cereal and water, which the appellee claimed the right to sell as "sausage" was unwholesome is abandoned in this court, and the only question argued and submitted is whether it was within the power of the Secretary of Agriculture to prohibit the use of the word "sausage" as false and deceptive, within the meaning of the act, when applied to the appellee's product.

The foregoing statement shows that the question for decision in this court is: Whether, in promulgating the regulation assailed, the Secretary of Agriculture acted arbitrarily and in excess of the authority given him by the act of Congress, to make, from time to time, such rules and regulations as are necessary for the efficient enforcement of the act, or whether he acted in good faith and upon substantial grounds in deciding that the sale of appellee's product as "sausage" resulted in deception of purchasers and consumers, so that his determination of such question of fact was within the power conferred upon him as the head of an executive department of the Government and is not subject to review by the courts.

The contention of the Government is that the product of the appellee being a meat food product, put up in containers—casings or canvas coverings—it falls within the prohibition of the act that such product shall not be sold or offered for sale by any corporation in interstate commerce "under any false or deceptive name," and that the regulation being for the purpose of preventing its sale under the false or deceptive name of "sausage," it is plainly within the authority given to the Secretary of Agriculture to make rules and regulations for the efficient execution of the act.

On the other hand, the contention of the appellee is that the product being wholesome and containing no dyes or chemicals, which render it unfit for human food, an earlier provision of the act applies, which it is asserted deprives the Secretary of all discretion in such a case and requires that he shall cause the product to be marked "Inspected and passed;" and also, it is claimed, that the word "sausage," when qualified as was required by prior regulations by including in the label such expressions as "Cereal added," or "Sausage and cereal," was not a false or deceptive name.

The contention of the appellee that if its product is

wholesome, and if it does not contain dyes and chemicals, the act imperatively requires the Secretary to mark its product as "Inspected and passed" is clearly unsound if the word "sausage" as applied to it is false and deceptive, for plainly the provision of the act requiring the marking of the product must be harmonized with the subsequent provision that no such meat or meat food product shall be sold or offered for sale under any false or deceptive name.

Whether or not the term "sausage," when applied to the product of the appellee, in which more than the permitted amount of cereal and water is used, is false and deceptive is a question of fact, the determination of which is committed to the decision of the Secretary of Agriculture by the authority given him to make rules and regulations for giving effect to the act, and the law is that the conclusion of the head of an executive department on such a question will not be reviewed by the courts, where it is fairly arrived at with substantial evidence to support it.

This rule has been most frequently applied in Land Department cases, but often also to decisions by heads of other departments.

Thus, to the action of the Secretary of the Navy in *Decatur v. Paulding*, 14 Pet. 497; to the action of the Secretary of the Interior, on full consideration of the subject, in *Gaines v. Thompson*, 7 Wall. 347, and in *Burfenning v. Chicago &c. Ry. Co.*, 163 U. S. 321; and to decisions of the Postmaster General in *Bates & Guild Co. v. Payne*, 194 U. S. 106, and *Smith v. Hitchcock*, 226 U. S. 53. The doctrine has been extended by act of Congress to decisions by the Secretary of Commerce and Labor, *Tang Tun v. Edsell*, 223 U. S. 673; *Zakonaite v. Wolf*, 226 U. S. 272; *Lewis v. Frick*, 233 U. S. 291.

The scope of the rule is illustrated by this court, saying in *Johnson v. Drew*, 171 U. S. 93, 99:

"If there is any one thing respecting the administra-

tion of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the land department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts."

And in *New Orleans v. Paine*, 147 U. S. 261, 264:

"In *Noble v. Union River Logging Railroad*, decided at the present term (*ante* 165,) we had occasion to examine the question as to when a court was authorized to interfere by injunction with the action of the Head of a Department, and came to the conclusion that it was only where, in any view of the facts that could be taken, such action was beyond the scope of his authority. If he were engaged in the performance of a duty which involved the exercise of discretion or judgment, he was entitled to protection from any interference by the judicial power."

That the case before us is one for the application of this rule is shown by the record, which contains an interesting history of what large manufacturers have come, in a more or less gradual progress, to regard as the proper ingredients of the product which they have sold as sausage, and which also shows, without conflict, that the ultimate purchaser and consumer of the product is not informed and in general does not know of the presence of cereal and added water in it. The evidence shows that the poorer classes of beef and pork are used in making sausage, such as trimmings, hearts, ears, cheeks, liver, snouts and tripe, "and all that kind of things," but the preferred material is bull meat; that such meat, other than bull meat, is dry and has not the cohesive properties which will unite it when ground or minced into the mass popularly known as "sausage" and that, for this reason, corn meal, potato flour and other like substances have come to be used by the trade as "binders" to give it the desired cohesiveness and appearance.

The president of the appellee testified that when he first began making sausage twenty-five years ago he used anywhere from five per cent. to twelve per cent. of cereal and that when the regulation was promulgated he was using two or three per cent. to ten per cent. when he used any at all, but that in a part of his product he did not use any, notably in that which was sent into Pennsylvania, where the use of cereal was prohibited by statute; that when he used ten per cent. of cereal he added from fifteen to twenty per cent. of water, and that in general water was added in double the percentage of cereal used; and that the cereal, usually corn meal or corn flour, was resorted to to cheapen the product and cost about two cents a pound, while the meat used cost from six to fifteen cents a pound.

Before the regulation assailed was promulgated cereal and water were generally used by large manufacturers of sausage, but all of the representatives of manufacturers, other than those of the appellee, who were called as witnesses, testified that they were obeying the regulation, and the agreement of such witnesses was general that retail purchasers and consumers did not know of the presence of cereal in what they were buying as sausage.

There is conflict in the evidence as to whether the use of cereal in excess of the prescribed amounts renders the product less digestible and wholesome, whether it reduces its food value, and whether the sausage will ferment in a shorter time than when cereal is not used at all, or when used in smaller quantities.

The result, thus stated, of the examination of the record before us shows, beyond controversy, that the Secretary of Agriculture in promulgating the regulation complained of acted on substantial evidence and with sufficient reason in concluding that persons purchasing or using as "sausage" the appellee's compound of various meats, cereal and water would be deceived as to its composition and

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as to its value as a food product, and we cannot say that it was an abuse of discretion to prohibit the use of the word "sausage" as applied to it, rather than to prescribe qualifying terms explanatory of it. Few purchasers read long labels, many cannot read them at all, and the act of Congress having committed to the head of the department, constantly dealing with such matters, the discretion to determine as to whether the use of the word "sausage" in a label would be false and deceptive or not, under such circumstances as we have here, this court will not review, and the Circuit Court of Appeals should not have reviewed and reversed the decision of the Secretary of Agriculture.

The decree of the Circuit Court of Appeals for the Eighth Circuit is reversed and the case remanded for further proceedings not inconsistent with this opinion.

*Reversed.*